No. 1184

In the Supreme Court of the United States

October Term, 1941.

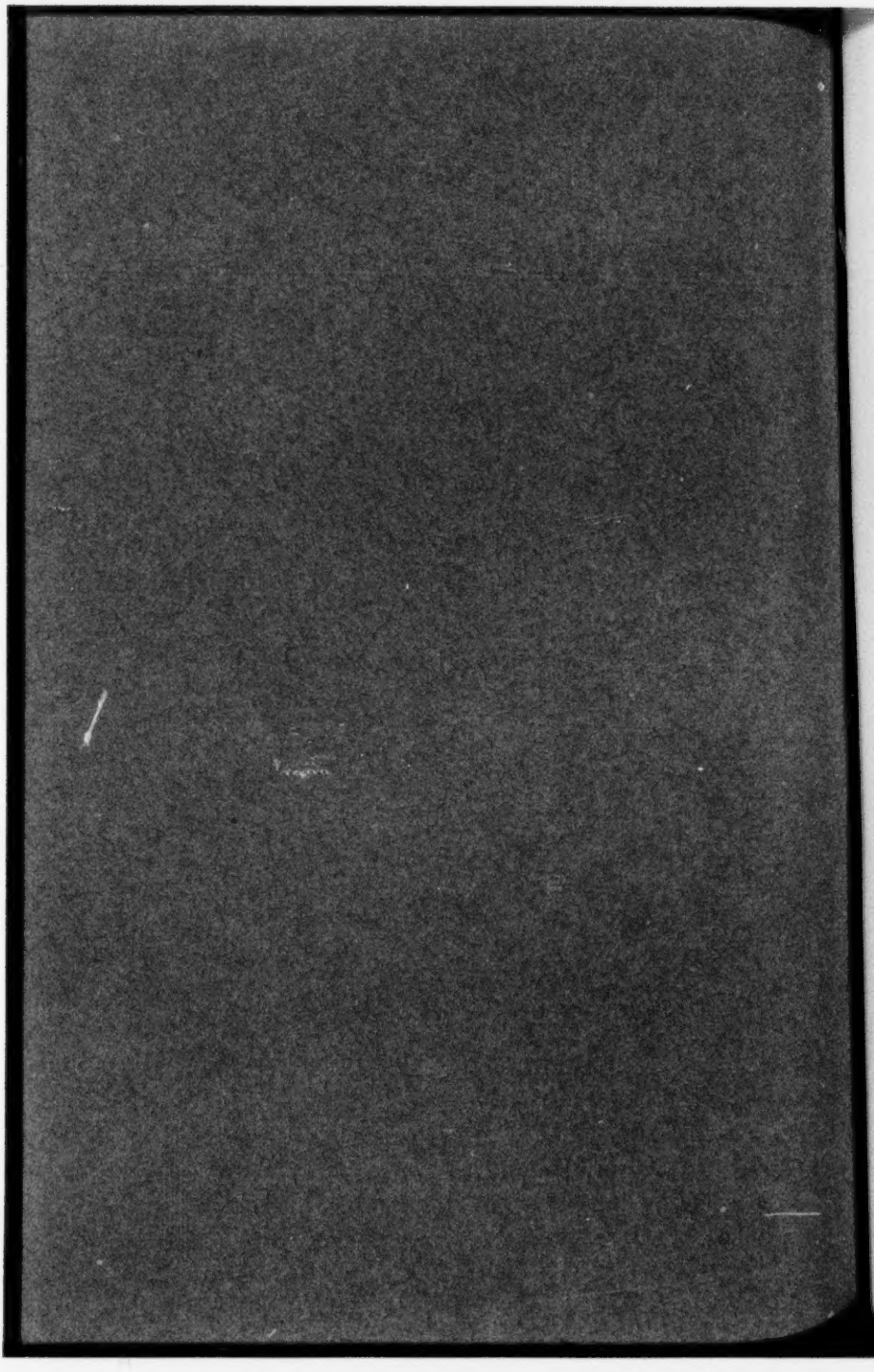
O. O. OWENS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

O. O. OWENS,
Petitioner,
Tulsa, Okla. Pro Se.



Corrected Index to Petition for Writ of *Certiorari* and Brief of O. O. Owens, Petitioner, in *Owens* v. *Commissioner of Internal Revenue*, No. 1184, October Term 1941.

INDEX TO PETITION FOR WRIT.

INDEX TO BRIEF.

POINT 1. As ground for this Court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the Receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919 (and unappealed from) of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of

PAGE

Reference to Judicial Code.

Reference to Congressional Acts.

Cases Cited.

On Capital "Outlay" or Investment:

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. .....

O. O. OWENS, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is a proceeding to determine the correctness of a deficiency in petitioner's income tax for 1920 resulting from disallowance by respondent of an expense or loss deduction.

In April, 1926, petitioner filed with the United States Board of Tax Appeals his petition for redetermination of a much larger deficiency. After prolonged delay a Memorandum Opinion (Rec. 51-52) and Decision (Rec. 60), resulting from the intercession and consequences of the acts

of unauthorized attorneys, were rendered October 8 and 11, 1932, respectively—and by Board order vacated and set aside on July 29, 1938, and the case set for hearing on the merits. (Rec. 152-153)

At a Board docket held in Tulsa, Oklahoma, in April, 1939, all items, transactions and issues, except the transaction and issue involved in this review, were disposed of by agreements and stipulations between counsel for petitioner and respondent (Rec. 164, 165), whereby the originally claimed deficiency was substantially reduced. (Rec. 164, 165, 469, 624)

Hearing on the issue here presented was continued to the Washington calendar of the Board and heard November 9 and 10, 1939 (Rec. 165-358). The Board's decision, sustaining and affirming the reduced deficiency of $28,-260.61, was entered February 13, 1941 (Rec. 624). An appeal was taken by Petitioner to the United States Circuit Court of Appeals for the Tenth Circuit, and the decision of the Board was affirmed by opinion and decree rendered January 13, 1942 (Rec. 645-651, 652). Petition for rehearing was denied February 26, 1942 (Rec. 690). The following is a statement of the matter involved:

In the late winter of 1898-1899, Barney Thlocco, a full-blood Creek Indian, and all his children and grandchildren died from a smallpox scourge within a short space of time, the only survivor of the family being Annie, the wife of Thlocco's son, John. No records of the dates and order of their deaths were made and such could not later be established. Annie, who died later, married Saber Jackson. Martha Jackson was the only child of that marriage. *McKinney* v. *Black Panther Co.*, 282 Fed. 486. (Rec. 634)

Subsequent to his death a 160-acre tract of land, now in Creek County, Oklahoma, was allotted to Thlocco (Rec.

194, 300, 304). The United States, in February, 1911, brought suit in the United States District Court for the Eastern District of Oklahoma, against the unknown heirs of Thlocco to cancel the allotment made to him, and in July, 1911, a decree, cancelling the allotment and ordering the 160 acres restored to the Creek Nation and sold on advertisement, was entered *pro confesso* (Rec. 195, 632).

Later oil was discovered in the vicinity of Thlocco's allotment. In 1913, J. Coody Johnson, an attorney at law, by written contracts with Saber Jackson, for himself individually and as guardian of Martha Jackson, was employed to manage, conduct and prosecute a suit in behalf of Martha Jackson, as sole heir of Thlocco, for the recovery of the 160-acre allotment. It was agreed that if Johnson should succeed in establishing Martha's heirship, he should have an oil and gas lease on the land; if he failed, he would get nothing for his services. In August, 1913, Saber Jackson, as guardian of Martha, and in November, 1913, Saber, for himself individually, executed oil and gas leases covering the allotment to Johnson, which were approved by the proper Probate (County) Court (Rec. 633, 315).

Johnson succeeded in getting the *pro confesso* decree set aside. Thereupon the suit was voluntarily dismissed and the United States at once filed a new suit in the same court against Bessie Wildcat, Martha Jackson, a minor, Saber Jackson, as her guardian, and some fifteen others, as heirs of Thlocco—and also against Johnson and the Black Panther Oil & Gas Company, to which Johnson had assigned his lease—as defendants (Rec. 633, 195). In April, 1914, such District Court appointed a Receivier and directed him to lease the land for oil and gas purposes for the term of the receivership, at a royalty of twenty-five per cent (25%) of the gross revenue and income, to be held for the benefit of the rightful owners to be ultimately determined. On April 30, 1914, the Receiver, in accordance with the order, entered

into a lease with the Black Panther Oil & Gas Company (Rec. 195), under which the property was initially and completely developed and one-fourth of the proceeds from oil and gas produced were impounded in the custody of the Receiver.

Between November 1, 1913, and May 3, 1915, approximately 225 Indians and others entered appearances in the suit, each claiming that he was an heir of Thlocco, or the assignee or vendee of an heir (Rec. 195).

On May 8, 1915, the District Court entered a decree against the United States, adjudging the allotment to be valid (Rec. 195). This decree was affirmed by the Supreme Court of the United States on May 21, 1917 (Rec. 196). *United States* v. *Bessie Wildcat*, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. ed. 1024. (Petition for rehearing thereon was denied in February, 1918 (Rec. 633).) This left for determination the question of the heirship of Thlocco and the ownership of his allotment and estate (Rec. 196, 633), jurisdiction to determine such question having been expressly reserved by the District Court in rendering its decree *(supra)*.

It was realized by all who asserted heirship that it was impossible to obtain certain and definite proof of the dates of the deaths of Thlocco and his children and grandchildren, and there was chance of casting the lines of descent in many different ways. Martha Jackson admittedly was not of Thlocco's blood. Her case at best was doubtful, both in fact and law (Rec. 634).

On July 6, 1916, Saber Jackson, in consideration of $10,000.00 in cash and an agreement to pay him an additional equal amount out of the impounded royalties, conveyed by deed his *contested and unadjudicated claim* to an estate by the curtesy to one Morley, acting as agent for petitioner, James Brazell and J. Coody Johnson. On August 6, 1916, Morley conveyed such interest by deed to his principals (Rec. 196).

On July 9, 1917, R. W. Parmenter, as guardian of the estate of Martha Jackson, entered into a contract with one Kelly, acting as agent for petitioner, Brazell and Johnson, whereby such guardian agreed to convey, and by deed of that date conveyed, Martha's *contested, unestablished and unadjudicated claim* to, and interest (if any) in, such allotment and impounded royalties to Kelly. In consideration therefor, Kelly, paid $12,000.00 in cash, and in addition, agreed to pay twenty-five per cent (25%) of the impounded royalties to which Martha might become entitled by judicial decree upon final determination in the District Court or by compromise in the aforesaid suit. Kelly further agreed to diligently and faithfully prosecute the establishment of Martha Jackson as an heir of Thlocco, and to have decreed to her the largest possible interest in the allotment and defeat or purchase all adverse claims (Rec. 196-197). Such contract and deed by the guardian were approved as provided by law by the County Court of Seminole County, which court had exclusive jurisdiction of Martha Jackson's person and estate. On July 24, 1917, Kelly transferred the interest so acquired to his principals, who assumed Kelly's contractual obligations (Rec. 196-197).

On February 26, 1918, petitioner, Brazell and Johnson, as first parties, entered into a contract with the Black Panther Company, as second party, whereby said company agreed to perfect at its expense their title to the Thlocco estate. This contract, after reciting the receivership, the lease by the Receiver, the prior leases by Saber Jackson and by the guardian of Martha Jackson, each of which provided for a one-eighth (1/8) royalty (but under which no oil or gas had been produced), and the assignment of the Jackson leases to the Black Panther Company, further provided:

> "*Whereas*, a question has arisen as to whether the before mentioned contract with said Saber Jackson was ever intended to bind the said party of the second

part, or its assigns, for the payment to the said Saber Jackson of the said one-eighth (1/8) royalty, and,

"*Whereas,* the parties of the first part have by purchase become the owners of whatever interest the said Martha Jackson and the said Saber Jackson have heretofore held in said property, as well as whatever interest the said Martha Jackson and the said Saber Jackson have in and to the royalties collected by the receiver before mentioned under order of the court, and,

"*Whereas,* it is desired by both parties to this agreement to settle this controversy,

"*Now, therefore,* this contract witnesseth:

"*First.* Parties of the first part are to receive one-half (1/2) of all the monies held by said receiver when the same shall finally be distributed under the order of the court, and are further to receive thereafter one-eighth (1/8) of all the oil and gas produced from said premises the same being the royalty interest due under the said Martha Jackson lease.

"*Second.* The party of the second part is to receive one-half (1/2) of the monies held by the said receiver when the same shall be finally distributed under the order of the court and out of said funds so received the party of the second part shall pay all expenses heretofore incurred, or that may be hereafter incurred, in vesting the title in and to said property in the said Martha Jackson. It being the intention of this agreement that the parties of the first part do hereby release unto the party of the second part, *upon the conditions heretofore expressed,* all claim in and to said monies and property by virtue of the claim of said Saber Jackson, and it being further understood that after the discharge of the receivership the royalty upon said property to be paid by the party of the second part to the parties of the first part shall be one-eighth (1/8) of the oil and gas produced therefrom free from any claim from the party of the second part upon said one-eighth (1/8) royalty." (Italics ours.) (Rec. 197-199)

Proceeding under Section 6 of the Congressional Act of May 27, 1908, 35 Stat. 312, the Secretary of the Interior interceded on the ground that Martha Jackson's sale contract of July 9, 1917, was ambiguous and uncertain as to the amounts Martha was to receive (Rec. 471). Because of that intercession, on May 11, 1918, Owens (petitioner), Brazell and Johnson, acting through Kelly, their agent, and Black Panther Company entered into a supplemental contract with Parmenter as guardian of Martha Jackson, which construed the prior contract of purchase, dated July 9, 1917, to provide:

> " * * * that if Martha Jackson is adjudged either by final adjudication of her title thereto, or by final settlement between the parties claiming same, to be the *owner* of said allotment of Barney Thlocco, that there shall be paid *to her guardian* the sum of One Hundred Eleven Thousand Six Hundred Seventy Dollars Seventy-four Cents ($111,670.74), in addition to the sum of Twelve Thousand ($12,000.00) heretofore paid, making a total of One Hundred Twenty-three Thousand Six Hundred Seventy Dollars Seventy-four Cents ($123,670.74), and *an additional sum that will equal twenty-five per cent (25%) of one-eighth (1/8) of the proceeds derived from the sale of oil and gas from said allotment from March 31, 1918, up to and including the determination of her interests by judgment and decree of the District Court of the United States for the Eastern District of Oklahoma, said twenty-five per cent (25%) of one-eighth (1/8) as aforesaid to be subject to any claim for expenses and administration of receivership* and all overpaid royalties by the lessees of the receiver that may be allowed by the District Court of the United States for the Eastern District of Oklahoma. It being the express purpose and intention of the parties hereto that the said Martha Jackson in addition to the said sum of One Hundred Twenty-three Thousand Six Hundred Seventy Dollars Seventy-four Cents ($123,670.74), shall have and receive one-fourth (1/4) of the one-half (1/2) of the impounded *royalties after March 31, 1918,*

> *after such claims as said funds may be subjected to have been paid,* and it is further agreed that from and after the date of said decree by the District Court of the United States for the Eastern District of Oklahoma, the said Thomas Kelly and Black Panther Oil and Gas Company shall succeed to her interest in all the royalties," (Italics ours.) (Jt. Ex. A-1, Rec. 295-296.)

and that Kelly and the Black Panther Company should immediately, faithfully and diligently undertake to purchase, at their own cost and expense, all claims adverse to Martha Jackson, and that all such claims theretofore or thereafter purchased, or contracted to be purchased, should be merged with the claim of Martha Jackson; and as to any claims theretofore or thereafter purchased, or contracted to be purchased by them, *Kelly and the Black Panther Company agreed, in behalf of such claimants, that a decree should be entered adjudging Martha Jackson the owner of said allotment, or should the decree be entered in favor of any other claimant the benefits thereof should inure to Martha Jackson, in determining her rights under the purchase contract and deed dated July 9, 1917.* A bond in the amount of $125,000.00 was given to guarantee the performance of such contract. (Jt. Ex. A-1, Rec. 296.)

In carrying out the obligations so assumed the Black Panther Company and its assignee, Bay State Oil & Gas Company, subsequently expended $395,480.34, of which $315,274.10 was expended in 1918 (Rec. 199).

On August 3, 1918, Kelly conveyed to James Brazell an undivided three-eighths (3/8), to O. O. Owens (petitioner) an undivided three-eighths (3/8), and to J. Coody Johnson an undivided two-eights (2/8) of the Martha Jackson claim to the Thlocco estate (Rec. 199).

Prior to October 7, 1918, *the Black Panther Company purchased and merged all, except one, of the claims to the Thlocco estate asserted adversely to that of Martha Jack-*

son. On October 7, 1918, Brazell, Owens and Johnson, pursuant to the contract of February 26, 1918 (supra), conveyed to Black Panther Company, their interest in the Saber Jackson interest or claim to the Thlocco estate (Rec. 199).

The single outstanding claim was not purchased because it was known to be groundless and based on fraud. In a trail in December, 1918, in the District Court, such unpurchased claim was proven to be fraudulent (Rec. 267).

On June 17, 1919, the United States District Court for the Eastern District of Oklahoma entered a decree adopting and ratifying the purchase contract of July 9, 1917, and the construing contract of May 11, 1918, and adjudging and decreeing that on or before July 9, 1917, Martha Jackson was the *lawful owner* of the Thlocco allotment and all royalties and income therefrom impounded by the Receiver; and quieted and perfected the title of petitioner and his associates, Brazell and Johnson, as her successors and vendees, to said allotment and funds and awarded them possession thereof,

> "*(1)* Save and except the necessary expenses of said receivership and the administration thereof;
>
> "*(2)* Subject to the claim of Martha Jackson for the sum of One Hundred, Eleven Thousand, Six Hundred, Seventy Dollars and Seventy-four Cents ($111,670.74) plus 25% of one-eighth of the proceeds derived from said lands between the 31st day of March, 1918, *and this date*, the foregoing amount, however, to be paid to Martha Jackson to be subject, as heretofore set out in this decree to her proportionate part of the expense and charges herein detailed, said proportionate part being one-eighth (1/8) of the entire expenses," (Italics ours.)

and reserved jurisdiction to adjust the equities between Petitioner, Brazell and Johnson and the Black Panther Oil & Gas Company and the Bay State Oil & Gas Company, and

between said companies, arising out of the contract of February 26, 1918, *(supra)* and arising out of other contracts between the two companies, until the petition to intervene filed by Saber Jackson had been determined by said court (Jt. Ex. B-2, Rec. 297).

About June 17, 1919, one W. E. McKinney, claiming to be the guardian of Martha Jackson, an incompetent—by virtue of appointment of the County Court of *Okfuskee County, Oklahoma*—filed an application for leave to intervene in the aforesaid suit, and to challenge the validity of her contracts and conveyances, which application was promptly denied (Rec. 199, 366, 447, 639).

On September 9, 1919, the court entered a decree dismissing the intervention of Saber Jackson (Rec. 200) and adjusting the equities of the Black Panther and Bay State companies, petitioner, Brazell and Johnson, in conformity with the prior contract of February 26, 1918, *(supra)* and the contract of May 11, 1918, *(supra)* and further adjusting the equities between the two companies in the Saber Jackson half of the impounded funds (Rec. 308, 366, 488).

On September 13, 1919, Saber Jackson and W. E. McKinney, as guardian of Martha Jackson, each appealed *from the respective orders of the District Court denying Saber's intervention and McKinney's petition for leave to intervene* (Rec. 200, Ex. 4, Rec. 631, Ex. 20, Rec. 632-644, Rec. 366, 447).

On February 25, 1920, Parmenter, the lawful guardian of Martha Jackson, an incompetent, commenced an original proceeding in the Supreme Court of Oklahoma against McKinney and the Judge of the County Court of Okfuskee County, Oklahoma, who undertook to make the appointment of McKinney as guardian, and prayed that a writ of prohibition might issue commanding the respondents to desist and refrain from further interference in the matter of the guard-

ianship of Martha Jackson. The writ, as prayed for, was issued March 29, 1921 (Rec. 631, 640, 641). (McKinney filed petition for rehearing which was denied September 13, 1921.) (Rec. 640, 641)

On May 6, 1920, the Secretary of the Interior entered his "judgment" and order, as follows:

"Department of the Interior,
Washington, D. C.

ORDER OF APPROVAL.

"*Re* application of Black Panther Oil & Gas Company, and the Bay State Oil & Gas Company, for the approval of a contract between R. W. Parmenter, guardian of Martha Jackson, Thomas Kelly and the Black Panther Oil & Gas Company, dated May 11, 1918; the application of the Black Panther Oil & Gas Company and the Bay State Oil & Gas Company, for the approval of oil and gas leases executed by Saber Jackson, as guardian of Martha Jackson, and by Saber Jackson, individually, covering the Barney Thlocco allotment, together with the respective contracts of employment in connection with the granting and making of said oil and gas leases.

"*The application heretofore made for the approval of the contract of May 11, 1918, made and entered into between R. W. Parmenter, as guardian of Martha Jackson, and Thomas Kelly and the Black Panther Oil & Gas Company, was withdrawn by the petitioners and is therefore not passed upon except in so far, if at all, as the same is in conflict with this order,* and if so the same is to that extent only disapproved. The said contract of May 11, 1918, has not heretofore been approved by the Secretary of the Interior or the Interior Department, as was erroneously recited in the decree of Hon. FRANK A. YOUMANS, Judge, dated June 17, 1919, in *The United States of America* v. *Bessie Wildcat, et al.,* Case 2017, equity, in the United States Court for the Eastern District of Oklahoma.

"*It is ordered* that the oil and gas lease executed by

Saber Jackson, as guardian of Martha Jackson, with J. Coody Johnson, under date of August 26, 1913, together with the contract of employment, dated June 30, 1913, by and between J. Coody Johnson, party of the first part, and Saber Jackson, as guardian of Martha Jackson, a minor, parties of the second part, and the oil and gas lease dated November 13, 1913, executed by Saber Jackson individually to J. Coody Johnson, together with the contract of employment between Saber Jackson individually and J. Coody Johnson, dated November 13, 1913, be and the same are hereby approved. The said leases cover the Barney Thlocco allotment, to-wit: the NW4 of Sec. 9, T. 18 N., R. 7 E., Creek County, Oklahoma, and were made as the consideration for the said employment contract.

"This controversy involves the interest of Martha Jackson, a minor, to the royalties in the hands of the receiver in the case of *United States of America* v. *Bessie Wildcat, et al.*, from the inception to the date on which the fee of the said real estate was conveyed by R. W. Parmenter, guardian, to Thomas Kelly, July 9, 1917, the validity of which conveyance is not involved in this proceeding and is not passed upon.

"The Secretary of the Interior is of opinion that in view of the said leases made to J. Coody Johnson in 1913, as aforesaid, the conduct of the parties subsequent thereto, including the contract of February 26, 1918, between the Black Panther Oil and Gas Company, James Brazell, O. O. Owens, and J. Coody Johnson, purporting to dispose of said royalties; that the said J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, and all persons claiming by, through, or under them, or any of them, are conclusively estopped from denying that the said Martha Jackson is entitled to receive less than the full one-eighth royalty mentioned in the lease so executed by her guardian, being one-half of the royalties accumulated prior to said conveyance and now in the hands of the receiver; *and the secretary finds, as a matter of fact,* that she is entitled to receive said one-eighth, her interest amounting

as of the date of the conveyance to Thomas Kelly, as aforesaid, to the sum of $325,000 approximately.

"This order is not intended to affect the rights of any of the parties to any other matter involved in litigation but merely to dispose of the interest of Martha Jackson in the royalties accumulated in the hands of the receiver up to the date of the conveyance aforesaid. If the result of litigation should be to give to the said Martha Jackson an interest in said royalties subsequent to July 9, 1917, the proceeding is retained in the department for such other action or order as the circumstances may then make necessary.

"Dated this sixth day of May, 1920.

(Signed): John Barton Payne,
Secretary of the Interior."

(Pt. Ex. 5; Rec. 314, 316.) (Italics ours.)

The secretary later promulgated a similar "judgment" and order in respect of Saber Jackson (Rec. 320-323). Saber was then declared incompetent by the County Court of *Okfuskee County,* and the same W. E. McKinney, who had been previously appointed by that court as guardian of Martha, was appointed guardian of Saber, and later substituted for Saber as appellant in his appeal from the order of the District Court, denying his intervention and dismissing his petition. The appointment of McKinney, as guardian of Saber, was not contested (Rec. 367).

The conduct of McKinney, the pretending guardian, while perfecting his appeal from the court's order denying him leave to intervene, the contest between Parmenter, the legal guardian, and McKinney, and the acts and efforts of the Secretary of the Interior, his agents and subordinates, as well as McKinney's efforts, to enforce the secretary's "judgment" and orders, prevented during 1920 the distribution of the impounded funds (Pt. Ex. 20; Rec. 632-644). To avoid further delay, *on or about December 5, 1920,* the

Black Panther Company and Brazell, petitioner and Johnson, on the one hand, entered into a contract with *McKinney,* as guardian of Martha Jackson, on the other hand—conforming to the demands of the Secretary of the Interior in respect of *payment* to Martha Jackson—whereby Brazell, petitioner and Johnson (instead of the Black Panther Company) unconditionally transferred, relinquished and assigned to Martha Jackson sufficient of their impounded funds to comply with the Secretary's Order (Rec. 279-285; Board's findings, Rec. 478, 479). Petitioner's share of such funds so transferred amounted to $75,989.20.

Pursuant to such contract, stipulation providing the transferred, relinquished and assigned funds should be delivered to the Superintendent for the Five Civilized Tribes for the use and benefit of Martha Jackson, signed by attorneys for McKinney as guardian of Martha Jackson, and by attorneys for Parmenter, her legal guardian, was filed in the Circuit Court (Pt. Ex. 17; Rec. 338, 339).

After denial September 13, 1921, by the Supreme Court of Oklahoma of McKinney's petition for rehearing, a "Supplemental Contract," dated October 22, 1921, with McKinney omitted and Parmenter substituted therein for him as guardian of Martha Jackson, providing for modification of the final decree of June 17, 1919, to direct distribution of Martha Jackson's funds to the Superintendent of the Five Civilized Tribes *(as demanded by the secretary)* instead of to her guardian, Parmenter, and relieving her of the administration expense, was signed by the parties to the *December 1920 contract* with McKinney, and a new stipulation, with the "Supplement Contract" attached, was filed in the Circuit Court. (Jt. Ex. C-3; Rec. 310. Pt. Ex. 20; Rec. 642.)

On March 25, 1922, the Circuit Court of Appeals approved such "Supplement Contract" and directed that the decree of the District Court be modified accordingly and in

no other respect, and that the District Court direct immediate transfer of $308,000.00 of the impounded funds to the Superintendent of the Five Civilized Tribes for the use and benefit of Martha Jackson (Pt. Ex. 20; Rec. 632-644).

Actual distribution and transfer of the money to the superintendent was made by the Receiver in September, 1922 (Rec. 200).

Further distribution of the impounded funds was prevented pending settlement, on behalf of Saber Jackson, with the Black Panther Company. On February 3, 1923, the Circuit Court approved the settlement between McKinney, as guardian of *Saber* Jackson, an incompetent, substituted for Saber Jackson as appellant, and the Black Panther Company and Bay State Oil & Gas Company (Rec. 201). Thereafter, in June, 1923, after adjustment and settlement of all administration expense and impounding $100,000.00 with the clerk of the District Court for the Eastern District of Oklahoma to pay ad valorem tax claims asserted by the taxing authorities of several Oklahoma counties (Rec. 607), distribution of the remaining impounded funds was made (Rec. 201).

Petitioner contends he was on the accrual basis for reporting taxable income. Petitioner took the deduction of $75,989.20 here in controversy as part of his expense sustained in 1920 in abating, in part, the aforesaid nuisances and attempting to expedite distribution (Rec. 288-291).

On February 13, 1926, respondent determined a deficiency against petitioner in the amount of $36,116.86 (Rec. 34-35). One of the items making up such deficiency was the disallowance of the deduction of $75,989.20.

In petitioner's original petition filed April 24, 1926, with the United States Board of Tax Appeals, two items or transactions were included. One was the disallowance of the aforesaid deduction. In such original petition the secre-

tary's "judgment" and order of May 6, 1920, was pleaded as the cause of the "loss sustained by virtue of judgment rendered, wherein taxpayer was compelled to relinquish in and to certain impounded funds purchased in 1918." (Rec. 32-37)

On July 6, 1926, respondent filed his answer, which was never amended, in which he admitted petitioner and his associates

> " * * * acquired a portion of the interests of Martha and Saber Jackson in a certain 160-acre tract, located in Creek County, Oklahoma, known as the Barney Thlocco allotment, and alleges that under the terms of said agreement any royalties accrued up to the date of purchase, to-wit, July 9, 1917, were to belong to the vendors.
>
> "Admits that the title to the property has been in litigation and that in 1917 the Supreme Court of the United States held that Martha and Saber Jackson were the legal owners of the allotment.
>
> * * * * * * * * and
>
> "Specifically denies that the taxpayer is entitled to any deduction on account of the award to Martha Jackson of $195,000, and alleges that the taxpayer had never treated or reported the $75,989.20, which he now seeks to take as a loss, as taxable income to him, and that said amount is to be deemed either a part of the purchase price paid by the taxpayer and his associates, or is to be regarded as a portion of the interests of Martha Jackson which were not acquired by the taxpayer and his associates." (Rec. 38-39)

At the conclusion November 10, 1939, of the continued hearing on the merits of the instant case, petitioner directed the Board Members' attention to his desire to amend his petition to conform to the proof, to which no objection was made by respondent (Rec. 293-294). Concurrently with his brief, petitioner tendered, with appropriate motion for leave to file, his amended petition conforming to the proof, in

which the deduction was pleaded as expense, as a loss, and as expense that resulted in a loss (Rec. 359-378). Subsequently, upon discovering new evidence, petitioner tendered, with appropriate motion for leave to file with the Board, his second amended petition in which the deduction was again identically pleaded (Rec. 440-465). Leave to file both such amended petition and second amended petition were denied (Rec. 480).

On October 8, 1940, the Board rendered its Memorandum Findings of Fact and Opinion (Rec. 468-481), in which it correctly found the existence of the McKinney 1920 contract or stipulation and parenthetically defined the substance thereof as "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), but in said opinion the Board confused and misstated other material and decisive facts, and so stated such facts as to make it appear that Saber and Martha Jackson had each appealed from the *final decree* of the District Court rendered June 17, 1919, *supra* (Rec. 305)—and the Board also confused *distribution or transfer* (by one trustee for Martha Jackson to another in 1922, of the funds assigned, relinquished and transferred to Martha by the December 1920 contract between McKinney and petitioner and his associates), with *payment*—

And held that, *on the cash basis* of reporting income for 1920, the deduction should be denied because no *payment* (confused with distribution) had been made by petitioner until 1922—

And further held that, *on the accrual basis* of reporting income, the deduction should be denied because the appeals taken by Martha and Saber Jackson created a contingency on petitioner's ownership of the impounded funds until March 25, 1922 (the date of rendition by the Circuit Court of Appeals for the Eighth Circuit of its opinion in *McKin-*

ney v. *Black Panther Company*, 280 Fed. 486 *(supra)*, affirming the trial court's order denying McKinney (Martha's pretending guardian) leave to intervene and approving the settlement and modification of the District Court's decree to provide for distribution of Martha Jackson's money to the Superintendent of the Five Civilized Tribes instead of to her legal and lawful guardian)—and also held that such contingency on petitioner's ownership of the impounded funds created a contingency on the payment by petitioner to Martha Jackson by the December 1920 contract (with McKinney). (Rec. 479)

In response to petitioner's motion (Rec. 481-521), the Board, by order entered November 30, 1940 (Rec. 522-523), revised its findings of fact to state *that the appeals taken by Martha (McKinney) and Saber Jackson were from orders denying petitions or pleas for leave to intervene* (thus correctly reflecting the facts and true situation that no appeals were taken from the *final decree (supra)*, and consequently no contingency existed on petitioner's ownership of the impounded funds nor on his payment to Martha Jackson by the December 1920 contract). However, the Board did not revise its conclusions of law to conform to its modified and corrected findings of fact, but left, unchanged, such conclusions and its decision based upon the confused, mis-stated and erroneous statement of facts, *viz.*, that Martha and Saber had appealed from the *final decree*. (Rec. 522-523)

Petitioner appealed to the Circuit Court of Appeals for the Tenth Circuit. On January 13, 1942, that court rendered its decree (Rec. 652) affirming the Board's decision denying the deduction, and concurrently rendered its opinion (Rec. 645-651) holding that the deduction in controversy was "*a capital outlay,*" and further holding, in substance and effect, that *payment made to expedite distribution of impounded income* (with title thereto finally adjudicated and possession awarded by final decree, unappealed from, of a

court of exclusive jurisdiction,—and free from adverse claims) *from lands or other property is capital investment in such land or property,* which rule is contrary to all (and particularly those of other Circuit Courts and of the United States Supreme Court hereinafter cited) previous judicial and Treasury Department constructions and interpretations of the Revenue Acts and rules and regulations in respect of deductions for expense or loss. Petition for rehearing thereon was denied February 26, 1942 (Rec. 690).

II.

Basis Upon Which It Is Contended That This Court Has Jurisdiction.

(1) This Petition for *Certiorari* is prosecuted pursuant to the provisions of Section 240 of the Judicial Code as amended (Title 28, Sec. 247, U. S. C. A.).

(2) The Opinion (Rec. 645-651) and Decree (Rec. 652) of the Circuit Court of Appeals sought to be reviewed were filed January 13, 1942. Petition for Rehearing was filed February 12, 1942 (Rec. 653-689), and denied by court order entered February 26, 1942 (Rec. 690).

III.

Questions Presented.

The questions presented by this petition are:

(1) Whether the assignment, relinquishment and transfer by petitioner of $75,989.20 of his impounded income (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) to Martha Jackson, by December, 1920 contract with McKinney to expedite distribution of impounded income, was *specifically additional consideration for the land* as contended by respondent before the Circuit Court—or was capital "out-

lay'' and transferred ''in order 'to adjust the matter' and effectuate a distribution of the entire fund,'' and therefore not deductible as held by the Circuit Court.

(2) Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,

Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income*, in the year the funds are transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties each claiming the right to act as trustee for transferee and receive the transferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties.

(3) Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income

therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in others to and awarding possession of such property and impounded income or funds—by appealing from an order of the trial court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trustee.

IV.

Reasons Relied Upon for Allowance of Writ.

There are "special and important" reasons for allowance of the writ. These are:

(1) The Circuit Court, in its opinion filed January 13, 1942, announces the revolutionary principle and lays down the startling rule that payment made to expedite *distribution of impounded income* (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) *from land or other property is,* in substance and effect, *capital investment in such land or property*—which rule is contrary to and in conflict with all previous judicial and treasury department interpretations and con-

structions of the Revenue Acts and Rules and Regulations in respect of allowable deductions for expense or loss, and is specifically contrary to the rule announced in the following cases:

First Nat. Bank in Wichita v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283;

Newark Milk & Cream Co. v. *Commissioner,* (C. C. A. 3) 34 F. (2d) 854;

Anahma Realty Corporation v. *Commissioner,* (C. C. A. 2) 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854;

King Amusement Co. v. *Commissioner,* (C. C. A. 6) 44 F. (2d) 708, *certiorari* denied, 282 U. S. 900;

Athol Mfg. Co. v. *Commissioner,* (C. C. A. 1) 54 F. (2d) 230;

Newspaper Printing Co. v. *Commissioner,* (C. C. A. 3) 56 F. (2d) 125;

Falk Corporation v. *Commissioner,* (C. C. A. 7) 60 F. (2d) 204;

Home Trust Co. v. *Commissioner,* (C. C. A. 8) 65 F. (2d) 532;

Clark Thread Co. v. *Commissioner,* (C. C. A. 3) 100 F. (2d) 257.

cited by the Circuit Court in support of its opinion and decision; and said opinion and decision here sought to be reviewed is also specifically contrary to and in conflict with the following additional opinions and decisions of other Circuit Courts and this Honorable Court, *viz:*

On Allowable Expense Deduction.

Kornhauser v. *United States,* 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505;

Bliss v. *Commissioner,* (C. C. A. 5) 57 F. (2d) 984;

Commissioner v. *Wurts-Dundas,* (C. C. A. 2) 54 F. (2d) 515;

Lucas v. *Wofford*, (C. C. A. 5) 49 F. (2d) 1027;
Atwater-Kent Mfg. Co. v. *Commissioner*, (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner*, (C. C. A. 3) 44 F. (2d) 147;
Ill. Central Co. v. *Commissioner*, (C. C. A. 7) 90 F. (2d) 461.

On Allowable Loss Deduction.

F. W. Darling v. *Commissioner*, (C. C. A. 4) 49 F. (2d) 111;
Dayton Co. v. *Commissioner*, (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas*, (C. C. A. 9) 44 F. (2d) 528;
United States v. *S. S. White Dental Mfg. Co.*, 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Commissioner v. *Brown*, (C. C. A. 1) 54 F. (2d) 569-570;
Rhodes v. *Commissioner*, (C. C. A. 1) 100 F. (2d) 966.

(2) The Circuit Court's opinion does not consider or review the Board's Opinion. Said court rendered its own opinion based upon a question of fact expressly not decided by the Board, and a question of law, without deciding it, also expressly avoided by the Board—and said court promulgated and rendered an opinion and decision which is inconsistent on its face, which is contrary to the well settled law as laid down by prior decisions of the Tenth Circuit Court, and which is also in conflict with the decisions and opinions of other Circuit Courts of Appeals and of the Supreme Court of the United States. And said Circuit Court of Appeals for the Tenth Circuit based and grounded its opinion upon an irrelevant narrative of statements contained in the void order of the Secretary of Interior, and completely failed to state or to consider the real, substantive, pertinent and decisive facts connected with, relating to, and a part of, the

Secretary's order, and by so doing, said opinion is based upon a premise directly in conflict with the facts established by the record.

(3) The opinion and decision of the Tenth Circuit Court here sought to be reviewed, in addition to being in conflict with the opinions of other Circuit Courts of Appeals and of the Supreme Court of the United States, will cause great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals, for the reason and because of the fact that *said court's opinion holds that payment to expedite distribution of impounded income from property* (with title thereto finally adjudicated and possession thereof awarded by final decree, unappealed from, of a court of exclusive jurisdiction,—and free from adverse claims) *is,* in substance and effect, *capital investment in such property.*

Wherefore, your petitioner prays that this Court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket No. 2333, *O. O. Owens, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment and decree herein of the said United States Circuit Court of Appeals for the Tenth Circuit, and the decision herein of the United States Board of Tax Appeals in docket No. 14,379, *O. O. Owens, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* before said board, may be reversed by this Court, and for

such further or other relief as to this Court may seem proper.

Respectfully submitted,

O. O. OWENS,
Petitioner, Pro Se.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinions of the Court Below.

A written Memorandum Opinion was rendered by the Board of Tax Appeals (Rec. 468-481), but same is not included in reported B. T. A. cases. The opinion of the Circuit Court of Appeals (Rec. 645-652) is reported in 125 F. (2d) 210-213.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this Court were stated under Paragraph II of the Petition for Writ of *Certiorari.*

III.

Statement of the Case.

This has been fully covered under "I" in the Petition for Writ of *Certiorari* and, in the interest of brevity, is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in not reviewing the opinion of the Board of Tax Appeals.

2. The Circuit Court of Appeals erred in rendering an opinion and decision based upon questions of fact and law

expressly excluded by the Board of Tax Appeals from its consideration.

3. The Circuit Court erred in sustaining the decision of the Board of Tax Appeals.

4. The Circuit Court erred in holding that the money transferred to Martha Jackson by petitioner in 1920, to expedite distribution of impounded income (with title thereto adjudicated and possession thereof awarded by final decree unappealed from), was capital "outlay"—or, in substance, capital investment in such property, and therefore not deductible.

5. The Circuit Court erred in not holding that the funds transferred by petitioner in 1920 to Martha Jackson was an expense sustained in the usual course of business to expedite distribution of petitioner's impounded income and, on either cash or accrual basis of reporting income, was, therefore, deductible as expense in determining petitioner's net taxable income for 1920.

6. The Circuit Court erred in not holding that the payment made by petitioner in 1920 to Martha Jackson, to expedite distribution of his impounded income, was an expense that resulted in a loss—and in not holding that such loss resulted from the Secretary's efforts to enforce his void order of May 6, 1920, purporting to require the Black Panther Company to pay to Martha Jackson royalty under the terms of an oil and gas lease under which no oil or gas had been produced—and in not holding that McKinney's appeal from court order denying him leave to intervene, and the Secretary's Order, and his and McKinney's efforts to enforce the same, created no contingency on petitioner's ownership of his portion of the impounded funds and created no contingency on petitioner's payment to Martha Jackson in 1920,—but that said order, and the Secretary's efforts to enforce the same, constituted a nuisance and an impediment

and prevented distribution to petitioner of his impounded income—and in not holding that payment by petitioner and his associates, instead of by the Black Panther Company as demanded by the Secretary, to Martha Jackson to prevent further delay in such distribution contained none of the elements of capital investment or capital "outlay," and that such payment was, therefore, deductible in 1920 as a loss since petitioner was legally entitled to distribution without having to make such payment by transfer of his impounded funds.

V.

ARGUMENT.

Following is a summary of the points which will be argued:

(1) As ground for this Court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919, (and unappealed from) of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of the Secretary—in consequence of which facts the opinion and decision of the Tenth Circuit Court of Appeals, holding that such payment was capital "outlay" (or investment) and therefore not deductible, is in direct conflict with the decisions of other courts, *viz:*

First Nat. Bank in Wichita v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283;

Newark Milk & Cream Co. v. *Commissioner,* (C. C. A. 3) 34 F. (2d) 854;
Anahma Realty Corporation v. *Commissioner,* (C. C. A. 2) 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854;
King Amusement Co. v. *Commissioner,* (C. C. A. 6) 44 F. (2d) 709, *certiorari* denied, 282 U. S. 900;
Athol Mfg. Co. v. *Commissioner,* (C. C. A. 1) 54 F. (2d) 230;
Newspaper Printing Co. v. *Commissioner,* (C. C. A. 3) 56 F. (2d) 125;
Falk Corporation v. *Commissioner,* (C. C. A. 7) 60 F. (2d) 204;
Home Trust Co. v. *Commissioner,* (C. C. A. 8) 65 F. (2d) 532;
Clark Thread Co. v. *Commissioner,* (C. C. A. 3) 100 F. (2d) 257,

cited in support of its decision. Said decision is also in direct conflict with the following decisions of this Court and other Circuit Courts, to-wit:

On Allowable Expense Deduction.

Kornhauser v. *United States,* 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505;
Bliss v. *Commissioner,* (C. C. A. 5) 57 F. (2d) 984;
Commissioner v. *Wurts-Dundas,* (C. C. A. 2) 54 F. (2d) 515;
Lucas v. *Wofford,* (C. C. A. 5) 49 F. (2d) 1027;
Atwater-Kent Mfg. Co. v. *Commissioner,* (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner,* (C. C. A. 3) 44 F. (2d) 147;
Illinois Central Co. v. *Commissioner,* (C. C. A. 7) 90 F. (2d) 461.

On Allowable Loss Deduction.

F. W. Darling v. *Commissioner,* (C. C. A. 4) 49 F. (2d) 111;

Dayton Co. v. *Commissioner,* (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas,* (C. C. A. 9) 44 F. (2d) 528;
United States v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Commissioner v. *Brown,* (C. C. A. 1) 54 F. (2d) 569-570;
Rhodes v. *Commissioner,* (C. C. A. 1) 100 F. (2d) 966.

(2) The Circuit Court did not review or consider the Board's Memorandum Opinion in support of its decision, which Memorandum Opinion erroneously decides the questions:

PROPOSITION I. "Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof had been awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,

"Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income,* in the year the funds were transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties, each claiming the right to act as trustee for transferee, and receive the trans-

ferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties."

PROPOSITION II. "Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in and awarding possession to others of such property and impounded income or funds—by appealing from an order of the trial court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

"Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trustee,"—but said Circuit Court rendered its opinion upon a question of fact not decided by the Board, and upon a question of law, without deciding it, expressly not considered by the Board.

(3) The Circuit Court's opinion and decision herein

should be reversed and Propositions I and II should be decided by this Court to eliminate conflict in the opinion and decision herein of the Tenth Circuit Court with the opinions of other Circuit Courts of Appeals and of this Court, and to eliminate great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in the construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals.

Point 1.

As ground for this court considering whether the writ should be issued, it should be considered that petitioner unquestionably owned, free from contingencies or adverse claims, three-eighths of one-half of the income impounded by the Receiver. His title thereto had been adjudicated, and possession thereof had been awarded to petitioner, by final decree rendered in 1919 (and unappealed from), of a court of exclusive jurisdiction when, by contract in 1920, he unconditionally assigned, relinquished and transferred to Martha Jackson $75,989.20 of his impounded funds to expedite distribution of the remainder, which distribution had been prevented by the arbitrary conduct of the Secretary—in consequence of which facts the opinion and decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of other courts mentioned in point (1) of "summary" of Argument on pages 28 and 29 hereof.

In the Circuit Court's opinion (Rec. 650) appears this conclusion and decision:

> "But whatever may have been the basis of the return, accrual or cash, the amount transferred, relinquished and assigned to Martha was a capital outlay and therefore was not deductible under Section 214, *supra*, either as business expense or a loss. *First Nat. Bank in Wichita* v. *Commissioner*, 46 F. (2d) 283; *Newark Milk & Cream Co.* v. *Commissioner*, 34 F. (2d) 854; *Anahma Realty Corporation* v. *Commissioner*, 42 F. (2d) 128, *certiorari* denied, 282 U. S. 854; *King Amuse-*

ment Co. v. *Commissioner,* 44 F. (2d) 709, *certiorari* denied, 282 U. S. 900; *Athol Mfg. Co.* v. *Commissioner,* 54 F. (2d) 230; *Newspaper Printing Co.* v. *Commissioner,* 56 F. (2d) 125; *Falk Corporation* v. *Commissioner,* 60 F. (2d) 204; *Home Trust Co.* v. *Commissioner,* 65 F. (2d) 532; *Clark Thread Co.* v. *Commissioner,* 100 F. (2d) 257."

In the case of *First National Bank in Wichita* v. *Commissioner, supra,* first cited by the Circuit Court in support of its decision, a stockholder in a bank transferred capital from one account to another. He transferred additional cash to the credit of bank stock previously purchased and thereafter retained by him.

Such transfer resulted from re-classification by a bank examiner of the bank's assets which determined an impairment of the bank's capital. The bank retained all its assets, re-classified. The bank's assets and the stockholder's interest therein remained unchanged, although re-classified. From a tax standpoint the stockholder occupied the same position as a farmer who transfers grain from a defective or deteriorating granary to a better one for the purpose of protecting the grain while repairing the emptied granary. The bank stockholder parted with nothing. Like the farmer transferring his grain from one granary to another, the bank stockholder preserved his capital. The facts of the cited case are not similar, and the legal principle announced has no applicability to the instant case.

None of the other cases cited by the Circuit Court in its opinion are in point as to the facts or the legal issues involved in the instant case. Without exception, the taxpayer in each of the other eight cases cited by the Circuit Court sought to claim as a business expense or a loss deduction an amount specifically provided in the original contract of purchase, or by the terms of acquisition of property, a part of the purchase price of, or cost of, or investment in, capital assets.

Here the capital assets (petitioner's interest in the Thlocco estate and impounded income thereof) had been previously purchased with funds other than those claimed as a deduction. Conveyance of the property and impounded funds had been made, title had been quieted and perfected and possession of the impounded funds was awarded by final decree, unappealed from, of a court of competent and exclusive jurisdiction, but distribution of such impounded income had been prevented by the arbitrary conduct of the Secretary in his efforts to force the Black Panther and Bay State Companies to pay royalty to Martha Jackson under the terms of an oil and gas lease based upon a claim to title (and under the terms of which lease no oil or gas had been produced) and notwithstanding Martha Jackson had sold to petitioner and his associates her claim to the entire estate (which included any royalty that might have accrued to her credit had the property been developed and oil produced under the terms of such lease)—all of which is clearly demonstrated by the following:

In 1913, Saber Jackson and the guardian of Martha Jackson, respectively executed oil and gas mining leases, each providing for one-eighth royalty, covering the Thlocco allotment. Those leases had been assigned to the Black Panther Company, but that company had not been permitted to develop the property under such leases. Instead, a lease for one-fourth royalty and for the duration of the receivership only, had been made by the Receiver, with court approval, to the Black Panther Company. (Rec. 195, 633) All royalty revenue accumulated by the Receiver was derived from oil and gas produced under such Receiver's lease. (Rec. 197, 199, 633, 634)

(Nevertheless, long after Martha Jackson had legally sold and conveyed to petitioner her unadjudicated and unestablished claim to the Thlocco estate and all income therefrom then or thereafter impounded by the Receiver, and

petitioner's title thereto had been finally adjudicated and possession of such impounded income had been awarded to petitioner by final decree, unappealed from, of a court of competent and exclusive jurisdiction, the Secretary, by his order of May 6, 1920, attempted to require the specific performance *by the Black Panther Company* of the royalty payment provisions of the Martha Jackson lease—(by demanding payment by that company to Martha Jackson of royalty accumulated by the Receiver under the Receiver's lease) to the date of her sale to petitioner of her unadjudicated and unestablished claim to the property.)

After the validity of the patent was sustained and petition for rehearing denied, February 11, 1918, by the Supreme Court (Rec. 197, 199, 633, 634), the Black Panther Company, for the purpose of retaining a leasehold estate without excessive royalty in the property after the owners of the allotment were ascertained and the Receiver discharged, entered into the contract of February 26, 1918, with petitioner and associates (Rec. 197-199) which provided for the purchase of and merging all claims asserted against the estate of Thlocco.

There had been no judicial determination of Thlocco's heirship and ascertainment of his heirs. The Black Panther Company, by that contract, recognized the fact that the identity of Thlocco's heirs could not be definitely and judicially established. (Ex. 20; Rec. 633, 634) By that contract the Black Panther Company recognized petitioner and his associates as the *owners* of the allotment and funds then and thereafter impounded; agreed to perfect petitioner's and his associates' title at its sole and exclusive expense; guaranteed the payment to, and receipt by, petitioner and associates of one-half the funds held by the Receiver at final distribution, and after discharge of the Receiver the payment to petitioner and associates of the royalty of one-eighth of the oil and gas produced from the Thlocco allot-

ment, "free from any claim" upon such royalty by that company, in consideration of the assignment and conveyance by petitioner and associates of the Saber Jackson "claim" and their releasing to that company all claim to the remaining half of the funds then and thereafter impounded by the Receiver. (Rec. 197-199)

By that contract the Black Panther Company assumed the burden and cost of purchasing all claims, except those of Martha Jackson and Saber Jackson which petitioner and associates had previously purchased, and merging them with the Martha Jackson claim—or of defeating all claims which could not be purchased. *That contract provided for and guaranteed the creation by purchase, compromise and settlements of an estate in Martha Jackson, and through her and her prior sale of her unestablished and unadjudicated claim, the perfection of petitioner's and associates' title to one-half the impounded funds and one-eighth royalty after discharge of the Receiver.*

By their contract of February 26, 1918, the parties recognized, and at all times thereafter treated and considered, the impounded funds as being separated or apportioned into two equal portions (halves)—one, the Martha Jackson half, which the Black Panther Company agreed and guaranteed should, at the discharge of the Receiver, be paid to and received by petitioner and his associates; and the other, the Saber Jackson half, upon which all claims by petitioner and associates were released to the Black Panther Company. Such impounded funds were also thereafter treated as two separate portions (halves) by all others, including the court in its supplemental decree of September 9, 1919, adjusting the equities between the parties, and also by the Secretary in making and attempting to enforce his void order of May 6, 1920.

The contract of May 11, 1918, did not change the con-

sideration or the purchase price paid and to be paid to Martha Jackson. It only construed the purchase contract by fixing the amount due Martha Jackson thereunder as at the latest possible date (March 31, 1918) for which records of accumulations by the Receiver were available, and contained additional provisions designed to guarantee the performance of the purchase contract, as well as the contract of February 26, 1918, between petitioner and associates and the Black Panther Company.

In interceding on behalf of Martha Jackson, and aiding Parmenter in procuring the construing contract of May 11, 1918 (Jt. Ex. A-1, Rec. 294-297), the Secretary's agents, representatives and subordinates proceeded under Section 6 of the Act of Congress of May 27, 1908, 35 Stat. 312, empowering the Secretary to supervise the administration in probate of the estates of minor allottees:

> "*Sec. 6.* That the persons and property of *minor allottees* of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that state or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, * * *."

In procuring such contract, the Secretary's agents, subordinates and representatives did not proceed under Section 9 of the Act of May 27, 1908, 35 Stat. 312, which, in part, provides:

> "*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of *any interest of any full-blood*

Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: * * *."

Thlocco's estate was unrestricted in the sense and to the extent that the leasing or the conveyance after July 27, 1908, the effective date of the aforesaid act, of his allotment by *any full-blood Indian heir or claimant* did not require approval by the Secretary, but only by the County Court having jurisdiction of the estate of the decedent.

Saber Jackson's deed, executed in 1916, *of his unestablished and unadjudicated claim* required only the approval of the County Court of Okfuskee County.

—*United States* v. *Gypsy*, 10 F. (2d) 487;
Graves Farm Loans. Inv. Co. v. *Deck*, 118 Okl. 18, 246 Pac. 397;
Eysenbach v. *Naharkey*, 110 Okl. 207, 236 Pac. 619;
MaHarry v. *Eatman*, 29 Okl. 46, 116 Pac. 935;
Harris, Gdn., v. *Gale*, 188 Fed. 712;
United States v. *Knight*, 206 Fed. 145;
Brown v. *Minshall*, 83 Okl. 98, 202 Pac. 1037;
Baird v. *England*, 85 Okl. 276, 205 Pac. 1098;
Hays v. *Wood*, 110 Okl. 45, 236 Pac. 3;
Aldrich, et al., v. *Crockett*, 118 Okl. 215, 249 Pac. 143;
Pritchett v. *Jenkins*, 111 Okl. 30, 238 Pac. 484;
Gypsy Oil Co. v. *Clinton*, 98 Okl. 282, 220 Pac. 587;
Wolf v. *Gills*, 98 Okl. 6, 219 Pac. 350;
Carey v. *Bewley*, 101 Okl. 235, 224 Pac. 990;
Dierks v. *Isaac*, 114 Okl. 158, 244 Pac. 750;
Terrell v. *Scott*, 129 Okl. 78, 262 Pac. 1071;
Potter v. *Vernon*, 129 Okl. 251, 264 Pac. 611;
Schmidt v. *Durant*, 136 Okl. 56, 276 Pac. 218;
Harris v. *Bell*, 41 S. Ct. 49, 254 U. S. 100, 65 L. ed. 159.

Martha Jackson's sale and conveyance of July 9, 1917, of *her unestablished and unadjudicated claim* required only the approval of the County Court of Seminole County. Had

Martha Jackson been, and had she subsequently been decreed to be, the sole heir of Thlocco, her conveyance required approval only by the Seminole County Court.

—*Harris* v. *Bell,* 254 U. S. 100, 41 S. Ct. 49, 65 L. ed. 159, and cited cases.

The contract of May 11, 1918 (Ex. A-1; Rec. 294-297), required only the approval of the County Court of Seminole County. *Harris* v. *Bell, supra.* That contract specifically provided for the settlement and compromise of all controversies affecting the ownership of Thlocco's estate and, notwithstanding the agents, representatives, subordinates of the Secretary were permitted, under Section 6 of the Act of Congress of May 27, 1908, *supra,* to collaborate with Parmenter as Martha Jackson's guardian, she being then a minor, in making and approving such contract, had Martha Jackson been, and had she subsequently been decreed to be the owner by inheritance of Thlocco's estate, that contract required only the approval of the County Court of Seminole County.

—*Carter Oil Co.* v. *Fleming,* 117 Okl. 239, 245 Pac. 833;
Harris v. *Davis,* 170 Okl. 35, 38 P. (2d) 562;
Derrisaw v. *Shaffer, et al.,* 8 Fed. Sup. 876.

When the claims of all defendants and intervenors (and many others who had not intervened) had been acquired in 1918 at the expense of the Black Panther Company, and conveyed to petitioner and associates, their title to the Thlocco estate and impounded funds was complete and vested. The claim proven and demonstrated in the trial in December, 1918, to be fraudulent (Rec. 267), was not a "claim," but only a "cloud." No appeal was perfected by such claimant from the court's decree that his claim was fraudulent.

On October 7, 1918, petitioner, Brazell and Johnson by deed to the Black Panther Company (Rec. 199), as provided

by their contract of February 26, 1918 (Rec. 197-199), conveyed Saber Jackson's claim as consideration for the performance by that company of such contract. They thereby recognized their title to be complete and perfect, and to have been made so by the Black Panther Company. They thereby recognized the "cloud," subsequently proven to be fraudulent in the December, 1918 trial (Rec. 199), to be worthless, and approved and accepted their title to the Martha Jackson half of the funds then and thereafter impounded and to the future one-eighth royalty after discharge of the Receiver.

The decree of June 17, 1919, quieted and perfected the title theretofore created by purchase, settlements and compromises in Martha Jackson, and through her, as trustee and conduit of title, in petitioner, Brazell and Johnson. That decree fixed as the amount due Martha Jackson the consideration provided in her sale contract of July 9, 1917, construed by the later contract of May 11, 1918. That decree did not adjudge Martha Jackson to be the "sole heir." (Ex. B-2; Rec. 297-309)

Saber Jackson's Claim.

The record reveals that Saber Jackson, as the father of Martha Jackson, claimed a life estate as tenant by the curtesy. This implied that descent was cast under the Arkansas law and on or after July 1, 1902, when chapter 49 of Mansfield's Digest of the Arkansas Laws, in respect of descent and distribution, was put in force in the Creek Nation. 32 Stat. 245; 33 Stat. 573; *Marx* v. *Hefner,* 46 Okl. 453, 149 Pac. 207. The Arkansas laws created and recognized an estate by the curtesy. For Saber Jackson to enforce an "estate by the curtesy" claim, he would, under Mansfield's Digest of the Arkansas Laws, have had to establish not only that descent to Martha Jackson was cast under the Arkansas

laws, but also that Martha Jackson was of the blood of Barney Thlocco.

—*Kelly's Heirs* v. *McGuire*, 15 Ark. 555;
Loftis v. *Glass*, 15 Ark. 680;
Scull v. *Vangine*, 15 Ark. 695;
Galloway v. *Robinson*, 19 Ark. 396;
Bird v. *Lipscomb*, 20 Ark. 19;
Moss v. *Ashbrooke*, 20 Ark. 128;
Campbell v. *Ware*, 27 Ark. 65;
Beard v. *Moseley*, 30 Ark. 519;
Magness v. *Arnold*, 31 Ark. 103;
Bozeman v. *Browning*, 31 Ark. 376;
Oliver v. *Vance*, 34 Ark. 564;
Kountz v. *Davis*, (1881) 34 Ark. 596;
Palmer v. *King*, 75 Okl. 276, 183 Pac. 411;
Roberts v. *Underwood*, 38 Okl. 376, 132 Pac. 673, 237 U. S. 386, 59 L. ed. 1007;
Marlin v. *Lewellen, et al.*, 276 U. S. 58, 48 S. Ct. 248, 72 L. ed. 467;
Thompson v. *Smith*, 102 Okl. 150, 227 Pac. 77;
Joines v. *Patterson*, 274 U. S. 544, 47 S. Ct. 706, 71 L. ed. 1194;
Roubedeaux v. *Quaker Oil & Gas Co. of Oklahoma*, 23 F. (2d) 277;
McDougal v. *McKay*, 43 Okl. 261, 142 Pac. 987, 237 U. S. 372, 59 L. ed. 1001;
Shulthis v. *McDougal*, 170 Fed. (C. C. A.) 529, 229 Fed. (C. C. A.) 872;
Thorne v. *Cone*, 47 Okl. 781, 150 Pac. 701;
Finlay v. *Amer. Trust Co.*, 51 Okl. 489 151 Pac. 865;
Cowokochee v. *Chapman*, 67 Okl. 263, 171 Pac. 50;
Buck v. *Simpson*, 65 Okl. 265, 166 Pac. 146;
Johnson v. *Dunlap*, 65 Okl. 216, 173 Pac. 359;
Finley v. *Thompson*, 68 Okl. 250, 174 Pac. 535;
Dailey v. *Benn*, 81 Okl. 285, 198 Pac. 323;
Moroney v. *Tannehill*, ... Okl...., 215 Pac. 938;
Stalcup v. *Mullen*, 49 Okl. 543, 153 Pac. 868;
Gillum v. *Anglin*, 44 Okl. 634, 144 Pac. 1145.

Martha Jackson was not of Thlocco's blood. She was

the child of Thlocco's daughter-in-law, Annie or Annie Nevey, by her marriage to Saber Jackson after the death of her first husband, John, who was Thlocco's son. (Ex. 20, Rec. 634)

Title by purchase, compromise and settlement.

In other words, title by purchase, compromises and settlements, was created and established in Martha Jackson and through her, as provided by her contracts, in petitioner and associates, and that title was quieted and perfected by the final decree of the United States District Court for the Eastern District of Oklahoma rendered *June 17, 1919.* (Rec. 297-309)

In that decree (Ex. B-2, Rec. 305) the court held and decreed that petitioner and associates were the owners of and entitled to possession of the Thlocco allotment and all funds then and thereafter impounded by the Receiver:

> "*(1)* Save and except the necessary expenses of said receivership and the administration thereof;
>
> "*(2)* Subject to the claim of Martha Jackson for the sum of One Hundred Eleven Thousand Six Hundred Seventy Dollars and Seventy-four cents ($111,670.74) plus 25% of one-eighth of the proceeds derived from said lands between the 31st day of March, 1918, *and this date,* the foregoing amount, however, to be paid to Martha Jackson to be subject, as heretofore set out in this decree to her proportionate part of the expense and charges herein detailed, said proportionate part being one-eighth (1/8) of the *entire expenses.*" (Italics ours.)

The amount thus decreed to Martha Jackson was the amount provided under her sale contract of July 9, 1917, as construed by the contract of May 11, 1918, to March 31, 1918 (the last date upon which definite figures were available on May 11, 1918).

From the record it is abundantly clear Martha Jackson

was decreed the definite sum of money for which her legal guardian, with approval of the proper County Court, had on July 9, 1917, sold her *unestablished and unadjudicated* claim and for her acting as conduit of title and trustee in merging and consolidating all claims; and that there was no condition or provision in her sale contract or the final decree by which she reserved title to any portion of the impounded funds. On the contrary, *the impounded funds were used as a yardstick or standard of measurement to determine the amount Martha Jackson should be paid*, and not any amount she reserved as the heir or the owner.

Under the settled law, she was entitled to no royalty, notwithstanding her lease. Under her sale contract and deed, she conveyed to petitioner and his associates all rights to royalty asserted or created by her lease.

Saber Jackson's appeal.

Saber Jackson had legally sold his *unestablished* and *unadjudicated* claim. Creating, by purchase, compromises and settlements, an estate in Martha Jackson for the purpose of making her deed and sale contract to petitioner and associates convey all the title to the estate and impounded income, did not create an "estate by the curtesy" in Saber Jackson. That claim had been so referred to only for the purpose of settlements and compromises in perfecting the title.

Saber Jackson was heard upon his petition to intervene, not because of the validity of his claim to an estate by the curtesy, but because he asserted he had been unfairly dealt with in his sale in 1916 of his unadjudicated and unestablished claim. (Rec. 309) The court did not disturb the final decree. After a hearing on Saber's intervening petition the court denied the same, which left the decree undisturbed and final. From the order denying his intervention, Saber appealed. (Rec. 200)

That appeal did not affect petitioner and his associates because they had previously, by their contract of February 26, 1918 (Rec. 197-199), released to the Black Panther Company all claim to one-half of (the Saber half) the money impounded by the Receiver, and by their deed of October 7, 1918 (Rec. 199), had conveyed, without warranty, the "Saber claim," to that company.

The Black Panther Company had guaranteed the payment to and receipt by petitioner and his associates of the other half of the impounded funds. Had Saber prevailed on intervention or appeal, petitioner and his associates would not have been affected by the consequences. Their title had been guaranteed by the Black Panther Company. It had been completed by purchases, compromises and settlements at the Black Panther Company's expense. Had Saber prevailed, only the Black Panther Company would have been affected. In that event, the Black Panther Company would have been required, under the prior contracts and to protect its own interests, to repurchase the claim of Saber Jackson.

However, had Saber's intervention been allowed, he would have been confronted with establishing Martha Jackson as the heir of Thlocco in order to establish his claim of "an estate by the curtesy," which he could not do. (Ex. 20, Rec. 634) *Kelly's Heirs* v. *McGuire*, 15 Ark. 555, and other cited cases, *supra*. The estate had been created by purchase. It had not been inherited by her. She at best, was trustee for merging all claims to the Thlocco estate and no life tenancy could attach for Saber Jackson to property and funds for which Martha Jackson was trustee.

McKinney's appeal.

McKinney's petition for leave to intervene was a nullity. His appeal from the order denying him leave was also null. Having been held by the Oklahoma Supreme Court to

have been illegally appointed (Ex. 20, Rec. 631, 640, 641), McKinney had no standing. Furthermore, he was attempting to intervene in a representative capacity for Martha Jackson, whose legal guardian had legally sold her *unestablished and unadjudicated claim* with the approval of the proper County Court, and with the later approval of the Secretary's agents and subordinates, under the provisions of Section 6 of the Act of May 27, 1908, *supra.* (Ex. 20, Rec. 637-638)

When McKinney was held by the opinion of the Oklahoma Supreme Court, rendered March 29, 1921, to have been illegally appointed and was prohibited, any question created by McKinney became not only moot—but such opinion also determined that he at no time before or after rendition of such opinion had any right to pretend to represent Martha Jackson, to intervene or to appeal. Consequently nothing McKinney did affected the decree or created a contingency on petitioner's ownership of the funds—nor created a contingency on payment made by assigning, transferring and relinquishing those funds.

Parmenter, the legal guardian, recognized the decree of June 17, 1919, as valid, binding and conclusive. McKinney was wholly without authority to act and, as stated by the court in *McKinney* v. *Black Panther Company, supra,* "Neither of them has a personal interest in this controversy; it was Martha's interest that was being dealt with. Parmenter appeared and was recognized by the court below in a representative capacity only, as Martha's guardian, and is estopped to deny or question that he appeared in that capacity." (Rec. 631, 640, 641)

Parmenter not only recognized the decree as valid, binding, conclusive and final, but procured from the Supreme Court of Oklahoma the writ against not only the County Court of Okfuskee County which appointed McKinney, but also against McKinney himself, prohibiting further interference with distribution provided by the court's decrees.

Under those circumstances McKinney's appeal from the order denying him leave to intervene was only a nuisance, and quite clearly intended by McKinney to create an impediment and obstacle to distribution of the impounded funds.

The record clearly demonstrates (Pet. Ex. 5 to 11, incl.; Rec. 314-325) that for the purpose of continuing his nuisance, McKinney, through his attorney Swift, enlisted the cooperation and assistance of the Secretary and collaborated with the Secretary's agents and subordinates in his efforts to prevent distribution. (Rec. 325)

The Secretary's "Judgment" and Order.

The Secretary promulgated his "judgment" and order of May 6, 1920 (Pet. Ex. 5; Rec. 314-317), in response to an application filed by the Black Panther and Bay State Companies for the approval of the Jackson leases made in 1913.

While those companies had never been permitted to develop or operate the property under either of the Jackson leases, they sought, as a matter of precaution, to have such leases approved because of a recent decision by the United States Supreme Court in the case of *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954. Such application for approval was not a recognition on the part of those companies of the jurisdiction and supervisory control by the Secretary over the Thlocco estate. The companies, by applying for the Secretary's approval, could not and did not create nor confer upon the Secretary jurisdiction which the law did not provide. Such application for approval was purely a precaution to protect the leasehold interest after discharge of the Receiver from additional frivolous attacks, and had nothing whatever to do with the royalty.

In his "judgment" and order the Secretary stated that the application for approval *of the contract of May 11, 1918,*

was withdrawn. The Secretary, having no jurisdiction over the leases, admittedly had no jurisdiction whatever over that contract, or the prior sale contract of July 9, 1917. *United States* v. *Gypsy Oil Co., supra,* and cited cases.

The only possible reason the Secretary might have had for exercising jurisdiction to approve those leases was a misinterpretation and misconception by the companies and by the Secretary of the legal principle announced in *Parker* v. *Richard, supra.*

In that case the Supreme Court held, that under the provisions of the departmental form lease under which the Richard land had been developed for oil and gas, and under the leasing regulations promulgated by the Secretary, the restrictions upon the allotments of full-blood allottees, leased and developed under the supervision of the Secretary of the Interior, were not released upon the death of the allottee but *relaxed;* that the Secretary had no jurisdiction over the sale by the full-blood heirs of the decedent's allotment and the royalty accumulated thereafter, but that the restrictions on the prior royalties, accumulated under his supervision and held by the Secretary of the Interior, continued.

In the instant case no such condition existed. The land had not been previously leased under the Secretary's supervision, nor subject to his approval. No oil had been produced under his supervision. No money had accumulated subject to his supervisory control. *Not one barrel, nor one dime's worth, of oil had been produced under the Jackson leases. The Secretary, as the moving party, prevented those leases, if valid, being enforced.*

The Secretary had instituted the suit to cancel the Thlocco allotment, had procured, with the consent of adverse parties, the appointment of a Receiver. The development of the property and the production of oil was exclusively un-

der the Receiver's lease and the trial court's supervision. The Secretary lost his suit, and was as effectively bound by the court orders and decrees as the other parties thereto.

—*United States* v. *Candaleria, et al.*, 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023; and cited cases.

Proceeding upon a misinterpretation, misconception and mis-application of the legal principle announced in *Parker* v. *Richard, supra,* the Secretary, by his order of May 6, 1920, approved the Jackson leases and the contract with Johnson, the attorney for whose services the leases were executed. The approval of such leases was all that the applicants requested. Their application did not invoke further jurisdiction, if the Secretary possessed it.

However, notwithstanding the Secretary, like all others, was bound by the judgment and final decree of the trial court rendered June 17, 1919, which fixed Martha Jackson's rights and equities in keeping with valid prior contracts and conveyances—and notwithstanding he had no jurisdiction whatever over the estate of Thlocco—and after disclaiming jurisdiction to pass upon the validity of the conveyance by Parmenter July 9, 1917, to petitioner and his associates of Martha Jackson's unestablished and unadjudicated claim to the land—in an apparent attempt to create, extend and enlarge claimed jurisdiction, the Secretary resolved himself into a court or judicial body and made findings, "* * * as a matter of fact * * *," contrary to the facts adjudicated and decree rendered by the United States District Court for the Eastern District of Oklahoma—which court had exclusive jurisdiction to ascertain and determine the owners of the Thlocco allotment and estate and to adjust their rights and equities. *United States* v. *Gypsy, supra.*

Pursuing such erroneous assumption of authority, the Secretary, after entering his "judgment," by order attempted to enforce the specific performance by the Black Pan-

ther Co. of the royalty provisions of the Jackson leases made in 1913—*and under which no oil or gas had been produced*—by requiring that company to pay as royalty the proceeds of oil produced under the Receiver's lease. The Secretary had specifically prevented those leases being effectuated by the Black Panther Company by procuring the appointment of a Receiver and the development and operation of the property under such Receiver's lease. Such order would have been void had the Secretary possessed jurisdiction in the premises. Having no jurisdiction whatever, his order and efforts to enforce it were only a nuisance, and by the arbitrary exercise of the power of his office in preventing distribution to force compliance with such order placed the Black Panther Company, petitioner and his associates, under duress.

The Secretary's order was not directed against petitioner and his associates except to the extent necessary to prevent distribution by enlarging the nuisance, impediment and obstacle created by McKinney.

Petitioner at no time claimed any interest in the Jackson leases. He purchased Martha Jackson's unestablished and unadjudicated claim, subject to the lease her guardian had previously executed, and which had been assigned to the Black Panther Company. Petitioner never questioned nor attacked that lease. (Rec. 197-199) By valid contracts, and conveyances of Martha Jackson's unestablished and unadjudicated claim, petitioner acquired title to whatever royalty might become due under the Martha Jackson lease should it be effectuated by subsequent ratification. There was no reservation in Martha Jackson's contract and conveyance of July 9, 1917, of any royalty due under her particular lease. (Rec. 196-197) No oil had therefore been produced under that lease. An attempt to reserve royalty under that lease would have been futile.

The Secretary's order, purporting to identify the royal-

ty due under the Martha Jackson lease as one-half the funds accumulated by the Receiver under the Receiver's lease up to July 9, 1917 (the date of Martha Jackson's sale of her unestablished claim), and directing that such one-half of the royalty funds be paid to the Superintendent for the Five Civilized Tribes for Martha Jackson, was an arbitrary usurpation and exercise of power, without the scope of his authority. Such order could only be enforced by the abuse of the power of his office—by delaying and preventing judicial process—by preventing distribution—and by the exercise of duress—which was the method adopted.

By the contract of February 26, 1918 (Rec. 197-199), petitioner was fully protected against the Secretary's order, or any consequences resulting therefrom, except the delay in distribution of the funds while the Secretary attempted to enforce his order. The order was a nuisance, obstacle and impediment unanticipated at the time the contract of February 26, 1918, was executed. The delay in distribution of the funds could not have been obviated by that contract —as a consequence of which petitioner, along with the Black Panther Company, was placed under the Secretary's duress.

Apparently, although no reference thereto was made in his "judgment" and order, the Secretary sought support of his assertion of jurisdiction from the case of *United States* v. *Hinkle*, 261 Fed. 518, wherein the Circuit Court for the Eighth Circuit, after exercising unusual care to confine its decision to the record in that case *as presented*, held that under Sections 19 and 20 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and Section 2 of the Act of May 27, 1908, c. 199, 35 Stat. 312, and the regulations of the Secretary of the Interior promulgated July 7, 1906, June 11, 1907, and April 20, 1908, "the exclusive custody and control of the mineral rents and profits derived from *restricted* lands of full-blood tribal Indian citizens * * * is vested in the Secretary of the Interior, subject only to such rules and regula-

tions as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land it self, * * *."

There another misconception and misapplication of a legal principle was made by the Secretary. The question, *as presented,* in the *Hinkle* case arose out of an attempted conveyance by a full-blood heir of mineral rents and profits produced from land not leased prior to July 27, 1908, by the judicially determined heir, with the approval and under the supervision of the Secretary, or thereafter with approval of the proper County Court.

There the record, *as presented,* demonstrated oil and gas had been *unlawfully* produced. In that case the record, *as presented,* disclosed no color of title whatever in the lessees nor in Mullen, their lessor. There the record, *as presented,* disclosed the defendant oil companies and the lessor, by invalid conveyance of the accumulated royalties, were trespassers. The record, *as presented,* in that case disclosed no title in the defendants and full title in the full-blood Indian heir. (When remanded to the District Court for further proceedings, the case was dismissed by the Government because it there developed that the defendants had good title through a deed previously executed by the full-blood heir to Mullen, approved by the proper County Court, which, through inadvertence, had not been pleaded or proven in the trial in the lower court.)

Had the heir leased the land for oil and gas prior to July 27, 1908, the effective date of the Act of May 27, 1908, *supra,* such lease, to be valid, would have required the approval of the Secretary. After July 27, 1908, an oil and gas lease by the heir required only the approval of the County Court having jurisdiction of the estate of the deceased allottee.

—*United States* v. *Gypsy Oil Co.,* 10 F. (2d) 487; and other cases cited, *supra.*

The land not having been leased by the heir, either with the approval of the Secretary or the County Court, the deed executed by the heir in 1913, and before the land was developed for oil, which had been approved by the proper County Court and which, through inadvertence, had not been pleaded or proven, conveyed the entire fee simple title to the land and all mineral rights. Consequently, no application could be made of the court's decision in the *Hinkle* case by the Secretary to the *Thlocco* case.

In the *Thlocco* case no such situation existed. The impounded funds derived exclusively from the sale of oil produced under a Receiver's lease covering land over which the Secretary had no jurisdiction whatever *(United States* v. *Gypsy* and other cited cases, *supra)* executed at the instance of the Secretary, and enforced and administered by the court having exclusive jurisdiction of the Thlocco estate, whose jurisdiction the Secretary had invoked and admitted in causing the suit to be filed—and by whose orders, judgments and decrees the Secretary was fully bound.

—*United States* v. *Candaleria,* 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023, and cases cited, *supra.*

Petitioner and his associates did not apply for the Secretary's approval of their purchase contract. Neither Martha Jackson in her own right nor her legal representative, sought the Secretary's approval of either the oil and gas lease or her sale contract and conveyance of her unestablished and unadjudicated claim.

The application for the approval of the leases could not have conferred upon the Secretary, had he had jurisdiction to approve those leases, the power and authority to legally inquire into and promulgate his "judgment" and order in respect of the funds. Those matters had all been adjudicated by a court of exclusive jurisdiction previously invoked by the Secretary when he caused the suit to be filed in 1913 to

cancel the patent to Thlocco's allotment. In attempting to require the specific performance of the leases after approving them, and without any application or petition filed by Martha Jackson or her proper representative, the Secretary ran afoul of, and proceeded contrary to, the rule announced in *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385, in which the court stated:

> "But while the Secretary is authorized to prevent improvident alienation or leasing by restricted Creek allottees, he is not authorized to alien or lease in their stead and right. * * * If an allottee chooses to alien or lease, the Secretary, if not satisfied that the transaction will be of benefit to the Indian, can prevent it by not approving it. But, if the allottee chooses not to alien or lease, the Secretary cannot do so for him, even though it appears that the Indian would be benefited."

With no jurisdiction in the premises, and with no appropriate petition or application invoking his action, the Secretary, in attempting to require the specific performance of the Jackson leases, not only attempted to override and overrule the final decree of a court of competent and exclusive jurisdiction, but attempted to substitute himself in Martha Jackson's place and stead.

Effect of the Secretary's intercession.

No supersedeas bond was given by McKinney in his appeal from the order denying his petition for leave to intervene, nor by Saber from the order denying his intervention. The decree remained final and undisturbed, with the equities adjusted by the supplemental decree. Distribution of the impounded income was prevented by the Secretary of the Interior pending the settlement of the controversy between himself and Parmenter as to which should receive not only the money ordered by the Secretary on May 6, 1920, to be paid by the Black Panther Company to Martha Jackson, but also the amount due her under her valid prior sale con-

tract, over which he had no jurisdiction *(United States* v. *Gypsy, supra),* and the final decree, which the Secretary sought to override notwithstanding he was bound by such decree.

—*United States* v. *Candaleria,* 271 U. S. 432, 46 S. Ct. 561, 70 L. ed. 1023, and cited cases, *supra.*

Clearly petitioner and his associates in 1920 owned, free from contingencies or adverse claims, one-half the funds accumulated and held in trust by the Receiver, and by their contracts and the court's final decree were required to pay out of such funds $111,670.74 as of March 31, 1918, plus an additional amount that would equal one-fourth of one-half the additional funds accumulated by the Receiver between March 31, 1918, and June 17, 1919, LESS one-eighth of the entire receivership administration expense, which, by her sale contract and the final decree, was charged to Martha Jackson—the net amount being payable to Parmenter as her legal guardian and not to the Secretary or his subordinates. (Rec. 295, 296)

It is equally clear that the *Secretary's void order of May 6, 1920,* directed against the Black Panther Company, purporting to require the payment by that company of royalty to Martha Jackson, *created no contingency on or adverse claim to petitioner's impounded funds. Therefore, the "matter" to be adjusted, as held by the Circuit Court* (Rec. 650), *was not defective title or cost of acquisition of property but was the cost of removing a nuisance and impediment to distribution of impounded funds, title to which had been finally adjudicated and possession awarded by final decree, unappealed from, of a court of exclusive jurisdiction.*

The right to collect and retain any royalty payments under the Martha Jackson lease passed and inured to petitioner and his associates under Martha's sale contract and deed of July 9, 1917. The Secretary, in his void order of

May 6, 1920, expressly conceded he had no jurisdiction to approve those instruments. *With no jurisdiction whatever to promulgate or enforce his order, the Secretary's conduct constituted only a nuisance and impediment to distribution. When the Black Panther Company refused to comply with the Secretary's order in respect of payment to Martha Jackson and petitioner and his associates made such payment to prevent further delay in distribution, such payment contained none of the elements of capital investment or "outlay" but was an expense deductible in determining net taxable income.*

Bliss v. *Commissioner*, (C. C. A. 5) 57 F. (2d) 984;
Commissioner v. *Wurts-Dundas*, (C. C. A. 2) 54 F. (2d) 515;
Lucas v. *Wofford*, (C. C. A. 5) 49 F. (2d) 1027;
Atwater Kent Mfg. Co. v. *Commissioner*, (C. C. A. 3) 43 F. (2d) 331;
Frank & Seder Co. v. *Commissioner*, (C. C. A. 3) 44 F. (2d) 147;
Illinois Central Co. v. *Commissioner*, (C. C. A. 7) 90 F. (2d) 461;
Kornhauser v. *United States*, 276 U. S. 145, 48 Sup. Ct. 219, 72 L. ed. 505.

The *Bliss* case is too long to be stated or discussed here, but an examination of it will reveal a clearly defined distinction between expense sustained in abating a nuisance and removing an obstacle and impediment to the use and enjoyment of income, and money paid out in the acquisition of property or the perfection and quieting of title thereto. There Bliss' (the taxpayer's) expense incurred in obtaining the free and unhampered use and enjoyment of his income was held to be deductible. The facts in respect of ownership, quieted and perfected title, and all other elements relating to income from previously acquired property are much stronger in the instant case than in *Bliss* v. *Commissioner, supra.* There an adverse claim to income was as-

serted. Here the Secretary's invalid and unauthorized demands were made against the Black Panther Company and not against petitioner. No claim against petitioner's portion of the impounded income can possibly be found in the Secretary's order.

In *Commissioner* v. *Wurts-Dundas, supra,* expense incurred by the guardian of Wurts-Dundas in establishing the minor's *right* to income from property was held to be deductible as a business expense. Here petitioner's right to the income had been previously adjudicated. No legal controversy or adverse claims affected petitioner's impounded income. The Secretary's demands against the Black Panther Company for payment, and against Parmenter for the right to administer the money demanded, constituted no adverse claim or contingency on petitioner's impounded income. Nevertheless it was clearly necessary for petitioner to assign, transfer and relinquish more than $75,000.00 of his impounded income in an effort to effectuate and expedite distribution to him of the residue thereof. Such payment, under the rule announced in the *Wurts-Dundas* case, was clearly deductible as expense when paid. The fact that such payment turned out to be fruitless strengthens petitioner's case, because it destroys any possibility of such payment being capital investment or "capital outlay."

In *Lucas* v. *Wofford, supra,* the taxpayer sustained expense in preventing the passage of legislation that would have been inimical to, or destructive of, his business, and such expense was held to be deductible as a necessary and ordinary business expense. Here petitioner was required to assign, transfer and relinquish more than $75,000.00 of his earned income in an effort to secure distribution of earned income for use in the conduct of his business. The issues are analogous, but the facts in the instant case are much stronger.

Atwater Kent Mfg. Co. v. *Commissioner,* (C. C. A. 3) 43 F. (2d) 331, and *Frank & Seder Co.* v. *Commissioner,* (C. C. A. 3) 44 F. (2d) 147. The first case states the rule on deductible expense announced and followed in the second case. (The facts and issues in both cases are peculiarly similar to the facts and issues in the instant case, and clearly distinguish the controlling principle in the instant case from the principle announced and followed in the cases cited in the Circuit Court's opinion.) For brevity we will discuss only the latter case since it cites the former with approval.

In *Frank & Seder Co.* v. *Commissioner, supra,* the taxpayer contracted to restore, or to pay the cost of restoring, two walls of a leased building at the expiration of its lease. The walls were removed so that the taxpayer could more conveniently, desirably and profitably conduct its business. The contract provided that if the taxpayer paid the cost of restoration, such payment should be made during the first year of the lease. The taxpayer made such election and paid in the first year $25,000.00, the agreed cost of restoration upon termination of the lease. The Commissioner denied the deduction. The Board defined the $25,000.00 estimated cost of restoring the property as "rent," but the Third Circuit Court of Appeals held, "This $25,000.00 was not 'rent,' but a necessary expense incurred in the taxable year in carrying on the business, and so was an allowable deduction for the year in which it was actually made."

Applying the principle announced to the instant case, the $75,000.00 here claimed as a deduction was not capital investment or capital "outlay," but was a necessary expense incurred in the taxable year in carrying on petitioner's business and to effectuate distribution to petitioner of his impounded income in order that he might continue to carry on his business, in the same manner that Frank & Seder paid the cost of restoration of the walls in order to be permitted to remove them and thus carry on its business and realize

and enjoy the income therefrom. The rule announced in *Frank & Seder Co.* v. *Commissioner* was cited with approval and applied in *Illinois Central Co.* v. *Commissioner,* (C. C. A. 7) 90 F. (2d) 461.

However, the second issue in *Frank & Seder Co.* v. *Commissioner, supra,* is so clearly in point as to be identical with the instant case, and the facts of which are so remarkably similar to the instant case that it is unquestionably decisive here.

Frank & Seder, Inc., operated a department store in Pittsburgh, Pa., which was totally destroyed by fire in 1917. A contract was immediately made for the erection of a new building. One Stuart received a fee of $40,000.00 as construction engineer to erect the building, which was to be completed by February 1, 1918, with a provision for a bonus of $10,000.00 if the building was completed before December 1, 1917.

In order to complete the building within the required time, it was necessary to pay a higher price for steel, and to work overtime at increased wages. The expense arising out of the increased wages alone amounted to $26,000.00. The excess cost of the steel was $44,024.00, and incurred solely to expedite the completion of the building in the shortest possible time so as to preserve the trade and good-will of the company.

The building would have been finished at the stipulated time had it not been delayed by general strikes which affected this and other buildings. In accordance with the provision in the contract, the time for completing the building was extended, on account of strikes, to May 1, 1918. Had completion of the building not been expedited by these additional payments, it would not have been finished, on account of the strikes, until January 1, 1919.

The question was whether or not the additional expense, totaling $84,372.75, having been spent in the fiscal year ended January 31, 1919, for the sole purpose of completing the building and resuming business on May 1, 1918, instead of January 1, 1919, was an expense deductible from income for that year. Petitioner contended that it was deductible expense. The Commissioner contended that it, like all ordinary capital expenditure, must be spread over the life of the lease and building. The Board sustained, but the court reversed, the Commissioner.

The court's reasoning is peculiarly applicable to the instant case. It said:

> "If this expense of expediting the completion of the building may be allowed as a deduction, it must be because it was necessary expense paid or incurred during the taxable year in carrying on the business or for the exhaustion, wear, and tear of the property used in the business. Usually the costs of material and labor are reflected in the building throughout its life. So far as the building does not remain permanent year by year, the owner is allowed a deduction and this in the years in which it occurs.
>
> "The expense paid for expediting the completion of the building was necessary in order to carry on the business during the fiscal year from May 1, 1918, to January 31, 1919. Without this additional expense there would have been no business conducted by the taxpayer during that time unless the company had rented a building, and if it had done so, the rent could have been deducted as a necessary expense incurred in carrying on the business. But instead of renting a building, the taxpayer expedited the completion of its own. Whether it was a better business policy to rent a building from May 1, 1918, to January 31, 1919, than to expedite the completion of its own, may be a debatable question. *But however that may be, the expense was incurred, and to carry on the business as planned it was necessary, and the evidence does not establish it to have been foolish or*

inexpedient. Consequently this was a necessary expense incurred during the taxable year in carrying on the business for which the statute authorizes a deduction. Therefore the deduction should have been allowed.

"The completed building on May 1, 1918, was worth what the expedition of the completion cost over what it would have cost to complete it by January 31, 1919. The exhaustion because of the wear and tear in carrying on the business between May 1, 1918, and January 31, 1919, was just this difference and for this a deduction should be allowed. *Atwater-Kent Manufacturing Company* v. *Commissioner of Internal Revenue,* (C. C. A.) 43 F. (2d) 331.

"The order of redetermination of the United States Board of Tax Appeals is reversed, the additional tax determined by the Commissioner set aside, and the income tax return of the petitioner approved."

The amount paid by petitioner in the instant case to expedite distribution to him of his impounded income occupied the same status as the amount paid to expedite the completion of the building in *Frank & Seder Co.* v. *Commissioner, supra,* and was paid for the same reasons and purposes. There the taxpayer incurred extra expense in order to expedite the construction of the building and more quickly resume and carry on its trade and business. Its good-will and business had been previously established. It sought to retain its good-will and resume as quickly as possible the conduct of its business in its own building. There delay in resumption of business was caused by strikes which increased the reasonable cost of the building. Here the delay in distribution was caused by the Secretary, which caused extra expense to petitioner in conducting his business. Here petitioner's ownership of his impounded income had been previously acquired and title thereto had been quieted and perfected. There the taxpayer, engaged in acquiring a capital asset, sustained expense in the conduct of its business.

Here the capital asset had been acquired and petitioner sustained deductible expense in attempting to secure distribution of impounded earned income in order to carry on his trade and business.

As stated above, the facts in *Frank & Seder Co.* v. *Commissioner, supra,* and in the instant case are so similar as to make the issues identical. The decision of the Third Circuit Court of Appeals in the case of *Frank & Seder* v. *Commissioner* should certainly be decisive of this case.

In *Kornhauser* v. *United States, supra,* the Supreme Court held:

> "Fees paid to attorney for defending action for accounting instituted by former partner are deductible from gross income as ordinary and necessary expenses paid or incurred during taxable year in carrying on business under Revenue Act 1918, Sec. 214, (a), subd. 1 (Comp. St., Sec. 6336⅛g), since, where suit against taxpayer is directly connected with business, expense incurred is 'business expense'."

The closing paragraphs of the opinion read:

> "In the *Appeal of F. Meyer & Brothers Co.,* 4 B. T. A. 481, the Board of Tax Appeals held that a legal expenditure made in defending a suit for an accounting and damages resulting from an alleged patent infringement was deductbile as a business expense.
>
> "The basis of these holdings seems to be that where a suit or action against a taxpayer is directly connected with, or, as otherwise stated *(Appeal of Backer,* 1 B. T. A. 214, 216), proximately resulted from, his business, the expense incurred is a business expense within the meaning of Section 214 (a), subd. 1, of the act. These rulings seem to us to be sound and the principle upon which they rest covers the present case. If the expense had been incurred in an action to recover a fee from a client who refused to pay it, the character of the expenditure as a business expense would not be doubted. In the application of the act we are unable to perceive

any real distinction between an expenditure for attorney's fees made to secure payment of the earnings of the business and a like expenditure to retain such earnings after their receipt. One is as directly connected with the business as the other."

Applying the principle announced, there is no distinction in the instant case from the *Kornhauser* case. Had petitioner employed attorneys to resist the Secretary's "judgment" and order and, by contract in 1920, assigned a portion of his impounded income as their fee for prosecuting the necessary legal proceedings to bring about or force distribution of petitioner's impounded income, the effect and results from the tax standpoint would have been the same as avoiding a lawsuit. In the instant case petitioner assigned, relinquished and transferred a portion of his impounded income to avoid the expense of a lawsuit and the loss of the use of his income, pending such litigation. Distribution of impounded income, title to which had been quieted and perfected and possession awarded by final decree by a court of competent and exclusive jurisdiction, and from which no appeal had been taken, was the object of making the payment here claimed as a deductible expense sustained in the usual and ordinary course of petitioner's business.

Loss Deduction.

After petitioner made payment of $75,989.20 to Martha Jackson in 1920, and the Secretary continued to prevent distribution until Parmenter, Martha's legal guardian, complied with his demands in respect of distribution,—and after partial distribution—(to the Superintendent of the Five Civilized Tribes in September, 1922, (Rec. 200) of $318,261.04, the sum of the amount due Martha Jackson under her sale contract and the additional amount paid in 1920 by petitioner and associates to expedite distribution)—the Secretary still continued to prevent distribution until the Black

Panther Company complied, in part, with the Secretary's demands in respect of payment to Saber Jackson (Rec. 321-323)—the payment made by petitioner became and resulted in a loss, since no benefits therefrom were derived by petitioner, and such payment was deductible as a loss in determining net taxable income.

—*F. W. Darling* v. *Commissioner,* (C. C. A. 4) 49 F. (2d) 111;
Dayton Co. v. *Commissioner,* (C. C. A. 8) 90 F. (2d) 767;
Seuffert Bros. v. *Lucas,* (C. C. A. 9) 44 F. (2d) 528;
Commissioner v. *Brown,* (C. C. A. 1) 54 F. (2d) 569-570;
United States v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 Sup. Ct. 598-600, 71 L. ed. 1120;
Rhodes v. *Commissioner,* (C. C. A. 1) 100 F. (2d) 966.

In *Darling* v. *Commissioner, supra,* the petitioner discharged the obligations of a company with no hope of recovery. Such payments, or most of them, were definitely losses and known to be when made. Here the payment was a loss because it was an exaction required in an attempt to expedite distribution of impounded income to which petitioner had quieted and perfected title, of which he had constructive possession, but distribution of which was prevented because of the arbitrary acts of the Secretary.

Petitioner was forced to transfer, relinquish and assign a part of his impounded income in an effort to avoid and prevent further and extended delay in distribution thereof and the loss of the use of such income. Petitioner was entitled to distribution, and although payment was voluntarily made to expedite distribution, the same would have been a loss had distribution been promptly made as anticipated, for the reason that petitioner was entitled to his income without being subjected to such exaction. With distribution being further delayed, certainly no benefits were derived by

petitioner, and most assuredly exactions of a portion of impounded income, title to which has been quieted and perfected by final decree of a court of competent and exclusive jurisdiction, to permit or expedite distribution of the residue can only be a loss.

In *Dayton Co.* v. *Commissioner, supra,* buildings were transferred for removal thereof in order to obtain the use of the land free from such buildings which constituted obstructions to the anticipated future use of the real property. There the cost of the razed improvements were held to be a loss and deductible as such. Here petitioner parted with title to part of his impounded income in order to effectuate distribution and obtain the use of the residue thereof. Petitioner owned the impounded income as clearly and as definitely in the instant case as the Dayton Company owned the razed buildings in that case, and as definitely as Darling, in *Darling* v. *Commissioner, supra,* owned the money paid to discharge the corporation's losses in an effort to more satisfactorily conduct his own business.

In *Seuffert Bros.* v. *Lucas, supra,* the taxpayer was held to have sustained a deductible loss through the payment of a substantial sum of money to prevent a highway being constructed through its property, on the ground that such highway would not have enhanced the value of the property or constituted an improvement, or otherwise benefited the taxpayer, but on the other hand, had such highway been constructed through the property, a substantial loss, in the form of damage to the property, would have been sustained. The cost of preventing the damage to the property was held to have been a deductible loss. In the instant case the cost of attempting to expedite distribution of impounded income and preventing the damage and loss that would be sustained through the loss of the use of such income by petitioner in his business is equally and as clearly deductible as a loss.

In *Commissioner* v. *Brown, supra,* the case of *United States* v. *S. S. White Dental Mfg. Co., supra,* is cited with approval and extensively quoted.

For convenience of discussion, the language of the First Circuit Court in *Commissioner* v. *Brown, supra,* is herewith quoted:

> "In the case of *United States* v. *Brown,* the Commissioner appeals from the decisions of the Board overruling the Commissioner in refusing to allow the partners, Jacob F. Brown, to deduct $72,961.83 as a loss in 1918, being the cost of certain Japanese government bonds purchased by him in 1916 and left in the custody of a Berlin bank, and which the German government, in 1918, seized as alien enemy property. While the Armistice was signed November 11, 1918, and the bonds were restored to the owner in 1920, the bonds were lost in 1918, as far as the owner was concerned, and there was no certainty at the end of that year that they would ever be restored to him. Peace terms between Germany and the United States were not agreed upon until much later.
>
> "The case of *United States* v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 47 S. Ct. 598, 600, 71 L. ed. 1120, seems to support the contentions of the petitioner, in which case the court said:
>
> > 'The case turns upon the question whether the loss, concededly sustained by the respondent through the seizure of the assets of the German company in 1918, was so evidenced by a closed transaction within the meaning of the quoted statute and treasury regulations as to authorize its deduction from gross income of that year * * *.
> >
> > 'The sequestration of enemy property was within the rights of the German government as a belligerent power and when effected, left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace. See *Littlejohn & Co.* v. *United States,* 270 U. S. 215, 46 S. Ct. 244, 70 L. ed. 553;

White v. *Mechanics' Securities Corp.*, 269 U. S. 283, 300, 301, 46 S. Ct. 116, 70 L. ed. 275; *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42, 45 S. Ct. 213, 69 L. ed. 504; *Stoehr* v. *Wallace*, 255 U. S. 239, 242, 244, 41 S. Ct. 293, 65 L. ed. 604; *Central (Union) Trust Co.* v. *Garvan*, 254 U. S. 554, 41 S. Ct. 214, 65 L. ed. 403; *Brown* v. *United States*, 8 Cranch, 110, 122, 3 L. ed. 504. What would ultimately come back to it, as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor. In any case the amount realized would be dependent upon the hazards of the war then in progress * * *.

'The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough for deduction without the taxpayer's establishing that there is no possibility of an eventual recoupment. It would require a high degree of optimism to discern in the seizure of enemy property by the German government in 1918 more than a remote hope of ultimate salvage from the wreck of the war. The taxing act does not require the taxpayer to be an incorrigible optimist.

'We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery.'

"The fact that the Japanese government was the petitioner's debtor when the only evidence of its indebtedness had been seized under the rights of belligerents during a state of war, and had become the property of the German government, and the only chance of its being restored to the taxpayer was either 'a matter of grace to the vanquished or exaction by the victor,' can hardly serve to differentiate the case of *United*

States v. *S. S. White Dental Mfg. Co., supra,* from this. Whatever doubts there may be on this and the other issues first considered, should be resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 38 S. C. 53, 62 L. ed. 211."

The analogy is perfect. Here the Secretary in effect, seized petitioner's impounded income by preventing distribution thereof to petitioner in his efforts to enforce his void order directed against the Black Panther Company. The Black Panther Company, by contract of February 26, 1918 (Rec. 197-199), agreed and bound itself to perfect petitioner's title to the Thlocco estate and one-half the income therefrom impounded by the Receiver, and further, agreed that "Parties of the first part (petitioner and his associates) are to receive one-half (½) of all the monies held by said receiver when the same shall finally be distributed under the order of the court, and are further to receive thereafter one-eighth (⅛) of all the oil and gas produced from said premises the same being the royalty interest due under the said Martha Jackson lease * * * free from any claim from the party of the second part upon said one-eighth (⅛) royalty." (Rec. 197-199)

The Black Panther Company performed that contract. Petitioner and his associates acknowledged and accepted such performance and on October 7, 1918, paid to the Black Panther Company the consideration for such performance, such consideration being a deed to that company of the Saber Jackson interest or claim to the Thlocco estate. (Rec. 199)

The United States District Court for the Eastern District of Oklahoma, with exclusive jurisdiction in the premises, by final decree rendered June 17, 1919, quieted and perfected petitioner's title as completed by the Black Panther Company's performance of its contract. (Jt. Ex. B-2, Rec. 297)

Petitioner was as much and as fully the owner of his portion of the impounded funds as was Brown the owner of the Japanese bonds sequestered by the German government. Here the Secretary, in substance and effect, sequestered petitioner's impounded income by preventing distribution thereof. Brown was without right to demand delivery of, or compensation for, his bonds until the declaration of peace. Here distribution of petitioner's impounded income was prevented by the Secretary, pending, *first*, settlement of his demands in respect of payment to Martha Jackson asserted against the Black Panther Company, and *second*, compliance with his demands by the legal guardian of Martha Jackson that the decree be modified to provide that Martha's money be distributed to, and custody thereof retained by, the Secretary or his subordinate.

With the Secretary preventing distribution and, in effect, sequestering petitioner's impounded income until his demands against the Black Panther Company and Parmenter, the legal guardian, had been fulfilled, petitioner occupied an identical position to that of Brown with his bonds seized by the German government and unable to reclaim or recover them pending a declaration of peace.

Petitioner was not involved in the controversy between the Secretary and the Black Panther Company, or that between the Secretary and Parmenter. The Black Panther Company had fully performed its contract with petitioner. That performance had been accepted, approved and payment therefor had been made by petitioner. The court, in effect, had decreed that the Black Panther Company had performed its contract. Time was not of the essence of such contract. Petitioner could not demand of, nor require that, the Black Panther Company comply with the Secretary's demands, nor that Parmenter yield to the Secretary's demands.

In *Rhodes* v. *Commissioner, supra,* the entire cost of, or investment in, property damaged by hurricanes, was held to be a loss deductible in the year when the hurricanes occurred because the taxpayer was unable to sell the property and determined it had no further value, notwithstanding in a later year the taxpayer salvaged a nominal amount out of one of the properties, which salvaged amount was considered income for the later year in which it was received.

Section 214 of the Revenue Act of 1918, and Section 214 of the Revenue Act of 1921, provide that casualty within the law authorizing deduction for loss means event due to sudden, unexpected or unusual cause. In *Shearer* v. *Anderson,* 16 F. (2d) 995, and in *Matheson* v. *Commissioner,* 54 F. (2d) 537, the courts held that "casualty is effect and not cause."

A casualty or a business calamity overtook the taxpayer in *Rhodes* v. *Commissioner.* While hurricanes in Florida were not unexpected, and damage resulting therefrom was not unusual, the entire cost of taxpayer's property damaged by hurricanes was held to be deductible as a loss in *Rhodes* v. *Commissioner, supra.*

The instant case is stronger. Here a casualty to petitioner's business resulted from the Secretary's void order and arbitrary conduct. The conduct of the Secretary was more unexpected than Florida hurricanes, and in violation of the reasonable legal presumption that the Secretary would act only within the scope of his authority. Petitioner was unable to prevent the Secretary promulgating and attempting to enforce his void order against the Black Panther Company in respect of payment, and his subsequent demands upon the legal guardian in respect of distribution and custody of Martha Jackson's money. Refusal on the part of the company to pay, and delay on the part of the guardian in complying with the Secretary's demands, delayed distribution to petitioner of his impounded income. With the

Black Panther refusing to comply with the Secretary's demands in respect of payment to Martha Jackson, had Parmenter, after petitioner made the payment demanded by the Secretary, continued to refuse to yield to the Secretary's demands and permit Martha Jackson's money to be administered by the Secretary or his subordinate, petitioner's income would have been impounded indefinitely, pending long drawn-out litigation, groundless in law and between other parties, but which nevertheless would have been prosecuted by the Secretary through the Supreme Court of the United States because of the amount of money involved.

It goes without saying, that during such protracted litigation the Secretary would have continued to prevent distribution to petitioner of all his accrued and accruing income so that all value to petitioner of his interest in the Thlocco estate and his income therefrom would have been lost or destroyed, pending such controversy. The fact that petitioner might have ultimately obtained distribution placed him in no different legal situation than the taxpayer in *Rhodes* v. *Commissioner, supra,* and in *Commissioner* v. *Brown, supra.*

The opinion and decision here sought to be reviewed is in direct conflict with each and all the above cited cases.

Clearly the Secretary's order created no adverse claim upon petitioner's impounded funds, title to which had been finally adjudicated and possession awarded by final decree, unappealed from, of a court of exclusive jurisdiction. Payment made to expedite distribution of such funds contained none of the elements of capital investment or "outlay" and is deductible under the authorities cited and discussed.

POINT 2.

The Circuit Court did not review or consider the Board's Memorandum Opinion in support of its decision,

which Memorandum Opinion erroneously decides the following Propositions I and II,—but said Circuit Court rendered its opinion upon a question of fact and upon a question of law, without deciding it, expressly not considered and not decided by the Board.

Proposition I. **"Whether, under the provisions of the Revenue Act of 1918, accumulated income held in trust—title to which had been quieted and perfected in and possession thereof awarded to the beneficiaries by final decree in 1919 (and unappealed from)—which was transferred, relinquished and assigned in 1920 by the beneficiaries in the usual course of business to remove a nuisance which created an obstacle and impediment to distribution of additional impounded funds, is deductible in 1920 as expense—or if such transfer, relinquishment and assignment was, or resulted in, a loss, whether it is deductible as a loss in 1920 in determining the beneficiaries' net taxable income; and,**

"Whether such loss or expense is deductible, *on the cash receipts and disbursements basis of reporting income,* in the year the funds are transferred, relinquished and assigned (1920), or in the later year (1922) such transferred, relinquished or assigned funds were actually distributed and physically delivered by the fiduciary as one trustee to another trustee for transferee, the delay in delivery being caused by a contest between two parties each claiming the right to act as trustee for transferee and receive the transferred, relinquished and assigned funds—to which contest the transferors or assignors (beneficiaries of the trust) were not parties."

The Board held (Rec. 478):

"* * * Petitioner claims that the court's order pursuant to the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson) caused the loss of $75,989.20 to himself.

"It will be observed from the findings of fact, *supra,* that it was not until September, 1922, that the money was paid out of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson. Consequently if petitioner's tax

return was compiled on the cash basis for the year 1920, neither a loss nor an expenditure in that year can be claimed since no money was actually paid in that year."

Time of Payment.

In its memorandum opinion the board confused "distribution" with "payment" and confused the date "September, 1922," when the Receiver made partial distribution of the impounded funds to the Superintendent of the Five Civilized Tribes for the benefit of Martha Jackson, with *payment* to Martha Jackson. The Receiver *paid* only his receivership administration expenses. He *distributed* the residue of those funds to the beneficiaries of the estate (the owners of the funds).

Those funds belonged to the owners in the proportions and the amounts fixed by the final decree of June 17, 1919, and the supplemental decree of September 9, 1919—until execution of the December, 1920 contract "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478) directly in the amount of $202,637.84 and, by which petitioner and associates assumed her one-eighth of the entire administration expenses and charged her portion of those expenses to the residue of their impounded funds. After such December, 1920 contract was executed, Martha Jackson owned—and the Receiver held $202,637.84, plus one-eighth of any uncomputed receivership administration expenses more in trust for her, and held correspondingly less in trust for petitioner and associates.

In September, 1922, $318,261.04 in United States Liberty Bonds was *distributed* to the Superintendent for the use and benefit of Martha Jackson. The additional $10,261.04 represented interest accumulated on such Liberty Bonds, after the December, 1920 contract. The Receiver *distributed* the impounded funds contrary to the court's decrees

of June 17, 1919, and September 9, 1919, as a result of the December, 1920 Contract "which awarded additional moneys out of the impounded funds to Martha Jackson." (Rec. 478)

No appeals had been taken from the decrees, as hereinbefore demonstrated, the term of court at which such decrees were rendered had expired, the District Court was without jurisdiction, power or authority to change or modify its decree, the Circuit Court likewise was without jurisdiction, power or authority to change or modify the decrees except by agreement between the interested and prevailing parties, because the appeals from the orders denying leave to intervene did not put the decrees in issue nor confer upon the Circuit Court jurisdiction to modify or affirm the final decree. The Circuit Court could only direct the modification of the decree to conform to agreement between the interested and prevailing parties.

Therefore, Martha Jackson's right to the additional sum of money paid to her (plus one-eighth of the entire administration expenses of which Martha Jackson was relieved) over and above the amount provided by her valid prior sale contract and the final decree, *was purely contractual.*

The "court's order" directed *distribution* in 1922 to the Superintendent for the use and benefit of Martha Jackson. Payment was made by "* * * *the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson).*" (Rec. 478) The authority for such "court's order" was contractual and was "* * * *the 1920 stipulation (which awarded additional moneys out of the impounded funds to Martha Jackson)* * * *." The "court's order" did not cause the *payment* nor create the loss. The "court's order pursuant to the 1920 stipulation" (Rec. 478) merely directed *distribution. Payment* was made by the December, 1920 contract. Consequently that contract and payment created and resulted in the loss.

Parmenter, until the December, 1920 contract was made with McKinney, was estopped to assert the Secretary's "judgment" and order. *McKinney* v. *Black Panther Co., Supra.* (Ex. 20, Rec. 631,642) The Secretary was also legally estopped to enforce his order. *United States* v. *Gypsy; Mott* v. *United States, supra.* McKinney was asserting the Secretary's demands and attempting to enforce his "judgment" and order. Until McKinney was later prohibited in March, 1921, he was the only person with whom the contract should have been made to abate the nuisance and remove the obstacle to distribution created by the Secretary's "judgment" and order.

When the December, 1920 contract was executed petitioner, his associates, and the Black Panther Company had done all they could do to comply with the Secretary's order *in respect of payment.* They were ready, willing and able to pay with *unimpounded funds* (Rec. 286-287, 291), but that was not acceptable to the Secretary. He specifically demanded *payment out of impounded funds* and the modification of the decree to so provide. Consequently, petitioner and associates *paid* the money out of the identical funds and in exactly the manner demanded by the Secretary. In so doing they contracted with the only person asserting the Secretary's demands who claimed the right to act for Martha Jackson.

The matter of modifying the decree to provide for distribution to the Superintendent, as trustee for Martha Jackson, instead of to Parmenter, as the law provided, required Parmenter's consent, approved by the Seminole County Court. Of course, petitioner and his associates could not force Parmenter to consent, nor the Seminole County Court to approve his consent. Pending settlement of the controversy between Parmenter and the Secretary, Martha owned the additional money, her title to the additional money awarded by the December, 1920 contract was complete, and

quieted and perfected by the same decree which quieted and perfected title to the remainder of the impounded funds—and the Receiver held such payment in trust for her.

Therefore, payment in 1920 was complete—*the transaction was closed as between petitioner and associates and Martha Jackson*—nothing remained to be done in respect of *payment*. The continuing controversy between Parmenter and the Secretary involved *distribution—not payment*—of Martha Jackson's money to one or the other of the contestants demanding the right to administer such money for her, and both of whom contended that it had been unconditionally paid to her and was unconditionally owned by her.

The Board's confusion of "payment" with "distribution" by the Receiver in September, 1922, of $318,261.04, to the Superintendent for the use and benefit of Martha Jackson, and the Board's conclusion, in effect, that petitioner's 1920 return was on the cash receipts and disbursements basis, and that no money was "paid" to Martha Jackson until September, 1922, and consequently neither a loss nor an expenditure in 1920 could be claimed by petitioner, makes necessary brief consideration of the 1920 contract and its effect upon the instant case.

Effect of December, 1920 contract.

The record discloses that Parmenter, on February 5, 1920, commenced his action in the Oklahoma Supreme Court for a writ of prohibition against McKinney, and the County Court of Okfuskee County which had made the pretended appointment of McKinney as Martha Jackson's guardian; that Parmenter was estopped to assert the *Secretary's demands*. (Ex. 20, Rec. 631, 640) After the December, 1920 contract "which awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478) had been executed, Parmenter was in position to assert his right to administer the $202,637.84 transferred to Martha Jackson —and did so.

Parmenter sought not only to prohibit McKinney from interfering with the administration of Martha Jackson's estate, but also to enforce his right as her legal guardian to administer the additional funds transferred to Martha Jackson by the December, 1920 contract—and not until October, 1921 (and after McKinney's petition for rehearing had been denied by the Oklahoma Supreme Court September 13, 1921, Rec. 631, 640), did he consent, with the Seminole County Court's approval, to Martha Jackson's money, due her under her sale contract and the final decree, but also the additional funds transferred to her by the December, 1920 contract, being *distributed* by the Receiver to the Superintendent for Martha's use and benefit. (Rec. 310-313)

Had the Secretary been content to permit Martha Jackson's money to be *distributed* to Parmenter as the law provided, there would have been no further delay in such *distribution*. With the Secretary demanding the decree be modified to provide for *distribution* to the Superintendent instead of to Parmenter, *distribution* was postponed by the Secretary's demands but that act did not change nor affect Martha Jackson's ownership of the additional money paid by the December, 1920 contract. Such delay in *distribution* merely continued the Receiver as trustee for Martha Jackson's money and delayed transfer of her money by one trustee to another.

The Secretary employed the same methods against Parmenter in his demands that Martha Jackson's money be *distributed* to his subordinate, the Superintendent, that he employed against the Black Panther Company, petitioner and associates in demanding *payment—viz,* duress—preventing *distribution* to Parmenter of Martha Jackson's money.

Of course, Parmenter and McKinney were claiming the right to act in a representative capacity only for Martha Jackson. The Secretary not only asserted such right, but

also sought to and did substitute himself for her. No one legally authorized to represent Martha Jackson made demand for the additional money prior to the December, 1920 contract. On the contrary, Martha Jackson's only legal representative, Parmenter, had repudiated the Secretary's demands and sought to enforce the decree.

It follows without argument that before Parmenter changed his position and asserted his right, as Martha Jackson's legal guardian, to have the additional money distributed to him, the contract "which awarded the additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), unconditionally assigned, relinquished and transferred such additional money to her. Thereafter all his efforts, as well as those of McKinney until he was finally estopped, by denial of his petition for rehearing by the Oklahoma Supreme Court, September 13, 1921, and the efforts of the Secretary were directed towards procuring *distribution* of Martha Jackson's money—with Parmenter asserting his right to have such money *distributed* to him and the Secretary demanding and finally forcing *distribution* of her money to the Superintendent. They—and not petitioner—after the December, 1920 contract was executed, claimed and exercised all control and dominion over such additional funds.

Effect of acceptance of contract:

Had McKinney's attempt to intervene and his pretended appeal created a contingency on petitioner's ownership of the impounded funds (which it did not) his acceptance of the 1920 contract removed such contingency on ownership and payment, and made the payment complete in 1920. After McKinney was prohibited in 1921 all questions he raised in his attempt to intervene and in his appeal became moot, and any contingency his appeal may have created (which was none) was extinguished and, by relation, as of

the date of his alleged appointment. Not being legally appointed he, of course, created no contingency on ownership and, therefore, created no contingency on payment.

Had McKinney been legally appointed guardian of Martha Jackson, and had he actually created a contingency on petitioner's ownership of the impounded funds, his acceptance of the 1920 contract disposed of any such contingency and settled and concluded any controversy over *payment* to Martha Jackson that may have resulted from the Secretary's "judgment" and order, and *payment* by the December, 1920 contract was complete.

—*Carter Oil Co.* v. *Fleming, supra;*
Harris v. *Davis, supra;* and
Derrisaw v. *Shaffer, supra.*

Not being such legal guardian, and having created no contingency on petitioner's ownership of the impounded funds, and with Parmenter asserting his right to administer the "additional moneys out of the impounded funds (awarded) to Martha Jackson," the payment by the December, 1920 contract was certainly complete.

—*Carter Oil Co.* v. *Fleming, supra;*
Harris v. *Davis, supra;* and
Derrisaw v. *Shaffer, supra.*

With the Secretary, McKinney and Parmenter all claiming the right to administer such additional money, the payment made by the December, 1920 contract was perfectly complete and free from contingencies.

With the Secretary's demands in respect of payment to Martha Jackson satisfied by the December, 1920 contract —with McKinney prohibited March 29, 1921, from further interfering with the administration of Martha Jackson's estate—with distribution of any of the funds being prevented by the Secretary until Parmenter agreed that Martha's money should be distributed to the Superintendent (which

eliminated any possible contingency on payment to her, and insured performance of the December, 1920 contract), and there remaining only the matter of Parmenter's complying with the Secretary's further demand that the decree be modified to direct distribution to the Superintendent instead of to Parmenter, the prolongation of the controversy between Parmenter and the Secretary did not in any manner affect the *payment* in December, 1920, to Martha Jackson.

That controversy only delayed and postponed the distribution by the Receiver as one trustee, to the Superintendent as another trustee, for Martha Jackson. During such continued controversy Martha Jackson's money was as securely and safely held in trust for her by the Receiver as it could have been held in trust by the Superintendent.

In its memorandum opinion the Board concluded no money was paid to Martha Jackson until September, 1922. (Rec. 478) *Under that theory,* if Parmenter had not yielded to the Secretary's demand in respect of modifying the decree to permit Martha Jackson's money to be distributed to, deposited with, and held in trust by, the Superintendent, and the controversy between Parmenter and the Secretary over the right to administer her funds had continued until the present time (notwithstanding the Receiver, in 1923, had distributed to all other owners their respective portions of such funds and continued until the present to hold Martha's money pending settlement or decision of the controversy between Parmenter and the Secretary)—*there would still be no payment to Martha Jackson.* In other words, the Board concluded that *payment* to Martha Jackson could only result from distribution by the Receiver, as one trustee, to either Parmenter or the Secretary, as another trustee. Such theory and conclusion, of course, are wholly untenable.

—*Dayton Co.* v. *Commissioners,* (C. C. A. 8) 90 F. (2d) 767, and cited cases.

With *payment* having been made by petitioner and accepted in 1920,—not only by McKinney, but also by Parmenter, her legal guardian, and by the Secretary, each of whom sought to have *distributed* to him as Martha's representative the funds transferred to her by the December, 1920 contract,—it is obvious and clear that *payment* was not only complete and accepted, but that all who claimed the authority to act in a representative capacity for Martha asserted *payment* had been made. It is also clear that when the Board's confusion of *payment* by petitioner with *distribution* by one trustee for Martha Jackson to another is eliminated, the erroneous conclusion of the Board (that no payment was made until 1922) is self-evident. It is equally clear that having found the 1920 stipulation "awarded additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), the Board would have concluded such moneys awarded to Martha Jackson by the 1920 stipulation constituted a deductible expense had the Board not confused "payment" in 1920 by petitioner with "distribution" in 1922 by the Receiver, as one trustee for Martha Jackson, to the Superintendent, as another trustee.

When, on September 13, 1921 (Ex. 20, Rec. 640), McKinney's petition for rehearing was denied by the Oklahoma Supreme Court and he was finally estopped from further attempting to act as Martha's guardian (although he was still in position to act as guardian of Saber Jackson), an agreement executed by Parmenter and approved by the County Court of Seminole County, was necessary before the Secretary's demand—in respect of modifying the decree to provide that Martha Jackson's money should be distributed to the Superintendent instead of to Parmenter—could be effectuated.

Such agreement—the "Supplemental Contract" (Ex. C-3, Rec. 310)—necessarily had to provide not only for the

modification of the decree but also the construing contract of May 11, 1918. (Ex. A-1, Rec. 294) That contract and the sale contract of July 9, 1917, provided expressly for payment to Parmenter, as Martha Jackson's guardian, of the sale price of her unestablished and unadjudicated claim.

Parmenter was still the legally appointed, qualified and acting guardian of Martha Jackson. To modify the decree, as demanded by the Secretary, required the signatures of all the interested and prevailing parties. Such "Supplemental Contract" did not change or affect in one iota the prior payment by the December, 1920 contract. It merely effectuated the settlement of the controversy between Parmenter and the Secretary, and was a detail implementing such settlement.

The other provisions of the "Supplemental Contract" were precautions against Parmenter's demanding distribution or payment under the sale contract and the construing contract, and against the Secretary's making any new or additional demands against the Black Panther Company under the Jackson leases.

With the facts clear and the law settled that the Secretary had no jurisdiction, power or authority to legally pursue in any particular the policy he adopted of subjecting the Black Panther Company, petitioner and associates to duress in enforcing his demands for payment to Martha Jackson, and by his preventing distribution of any of the funds until his demands had been complied with, it is abundantly clear that the December, 1920 contract was the identifiable event, the closed transaction, which effectuated the Secretary's invalid order in respect of *payment*—

And with his subsequent conduct of preventing distribution until Parmenter yielded to his demands and consented, with the Seminole County Court's approval, to Martha's money being distributed to the Superintendent,—and con-

tinuing after Parmenter's consent, to prevent distribution of any of the funds until Martha's money had been actually distributed to the Superintendent, which insured not only the performance of the December, 1920 contract in respect of *payment*, but also Parmenter's performance in respect of *distribution*,—

It is also abundantly clear that all events, developments, stipulations, agreements or supplemental contracts were mere details to enable the Secretary to have Martha Jackson's money, due under her sale contract and the court's final decree, together with the additional funds he demanded, distributed to his subordinate instead of to Parmenter, as the law provided;—and that by relation, the date of the Secretary's order, May 6, 1920, is the date the *loss* was sustained. *Dayton Co.* v. *Commissioner, supra.*

Deductibility.

On the cash receipts and disbursements basis, the three prerequisites to deduction as a loss being *(1)* ownership of assets, *(2)* sustained in the taxable year, and *(3)* not compensated for by insurance or otherwise, have here been clearly established. Petitioner, in 1920, not only owned his portion of the income impounded by the Receiver, but also had constructive possession thereof, the decree of June 17, 1919, having specifically decreed the possession of such funds to petitioner. (Jt. Ex. B-2, Rec. 305)

With petitioner's ownership having been established, the *payment* having been made in 1920, and it being conceded by respondent that petitioner was not compensated by insurance or otherwise in the transaction, it is abundantly clear that the assignment, relinquishment and transfer of the money to Martha Jackson by the December, 1920 contract, was a payment in the usual and ordinary course of petitioner's business, although he was in fact under duress

—and that at the time of making such payment it was *both an expense and a loss.*

On the expense basis, petitioner paid out the money to avoid further delay in the distribution of his impounded income, to which he had quieted and perfected title, of which he had constructive possession, and for which the Receiver was the statutory taxpayer whose mandatory duty it was to report such income and pay the tax thereon, as a consequence of which, all requirements of the Revenue Acts and regulations, in respect of reporting, had been fulfilled and such payment is clearly deductible as expense.

—*Bliss* v. *Commissioner, supra;*
Atwater Kent Mfg. Co. v. *Commissioner, supra;*
Frank & Seder Co. v. *Commissioner, supra;*
Illinois Central Co. v. *Commissioner, supra.*

Had petitioner employed attorneys to resist the Secretary's "judgment" and order and by contract in 1920 assigned a portion of his impounded income as their fee, the effect and results from a tax standpoint would have been the same as avoiding a lawsuit, and such payment is deductible as expense.

—*Kornhauser* v. *United States, supra;*
Lucas v. *Wofford, supra;*
Commissioner v. *Wurts-Dundas, supra.*

At the time of making such payment by the December, 1920 contract, it was definitely a loss *(F. W. Darling* v. *Commissioner,* 49 F. (2d) 111; *Seuffert Bros.* v. *Lucas,* 44 F. (2d) 528-530 (C. C. A. 9)); because, without in any manner improving or perfecting his title, petitioner, while under the Secretary's duress, assigned, relinquished and transferred to Martha Jackson funds to which he had title, quieted and perfected by a court of competent and exclusive jurisdiction *(United States* v. *Gypsy, supra),* and by whose orders and decrees the Secretary was fully and completely bound.

—*United States* v. *Candaleria, et al., supra.*

Such loss was sustained by petitioner in an effort to avoid the expense of a lawsuit with the Secretary over the invalidity of his "judgment" and order and the further loss by petitioner of use of his income and, as such, is deductible.

—*Seuffert Bros.* v. *Lucas*, 44 F. (2d) 528-530 (C. C. A. 9).

When Deductible.

With the December, 1920 contract having been executed and petitioner and his associates having thereby assigned, relinquished and transferred the $202,637.84 to Martha Jackson, and having parted title with and relinquished all future control, custody or dominion over such funds, the transaction was complete and *deductible in 1920 (Dayton Co.* v. *Commission, supra; F. W. Darling* v. *Commissioner, supra)*, regardless of the length of time necessary to settle the controversy between Parmenter, McKinney and the Secretary, during which time the Receiver, as one trustee, continued to hold such money in trust for distribution to another trustee for Martha Jackson, and until distributed he held more money in trust for Martha Jackson and correspondingly less money in trust for petitioner and associates than provided by the final decree and Martha Jackson's sale contract.

Proposition II. **"Whether, within the interpretation of the Revenue Acts, one person by appealing from an order denying leave to intervene and leave to assert an adjudged and decreed fraudulent claim to impounded funds—and another person (an interloper)—claiming through invalid recent appointment the right to act as guardian for another, whose legal guardian had legally sold the ward's *unestablished and unadjudicated* claim to real property and impounded income therefrom, and had properly represented his ward in years of litigation in which a final decree had been rendered quieting and perfecting title in and awarding possession to others of such property and impounded income or funds—by appealing from an order of the trial**

court (which rendered the final decree) denying him (the interloper) leave to intervene in said suit, created a contingency on the beneficiaries' ownership of such impounded income or funds—and

"Whether the transfer, relinquishment and assignment by the beneficiaries of part of such income or funds held in trust to remove a nuisance which created an obstacle and impediment to distribution is deductible, *on the accrual basis for determining net taxable income of assignors or transferors* (beneficiaries of the trust), as a loss or expense in the year funds were transferred, relinquished and assigned (1920), or in the later year when the contest over the guardianship terminated (1921), or in the year (1922) when actual distribution and physical delivery of such funds was made by the first trustee to another trutee."

The foregoing discussion and argument of Point 1 and Proposition 1 are equally applicable to and settle Proposition II in petitioner's favor.

Proposition II is created by the Board's erroneous conclusion (Rec. 479) that

> "If it had been finally adjudged in 1922 that Martha Jackson's claim to the Thlocco grant was not valid, there is no question that Martha Jackson could have claimed nothing under the 1920 contract because there would have been no impounded funds from which Martha would have had a right to be paid. It is thus evident that throughout the years 1920 and 1921 and up until March 25, 1922, there was always a contingency on petitioner's assumed obligation. That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal."

The Board's confusion of the facts is as self-evident as its above quoted conclusion is erroneous. The appeal referred to as "the 1922 appeal" is McKinney's appeal from the court's order denying his petition for leave to intervene (Rec. 632-644). In the record such appeal was, for convenience, referred to as Martha Jackson's since McKinney claimed to be her guardian.

With Parmenter, Martha's legal guardian, the only person legally authorized to represent her, *asserting the finality of the decree of June 17, 1919,* and successfully prosecuting a suit to prohibit McKinney from interfering with distribution of her impounded funds and administration of her estate, McKinney was at all times an interloper who was properly denied leave to get into the case. Neither Martha Jackson, in her own name, she being an incompetent after attaining majority, nor Parmenter, her lawful guardian, appealed from the decree.

McKinney's appointment, as guardian of Martha, being void he, of course, had no right to intervene nor to appeal from the court's order denying his petition. His attempts to intervene and to appeal were null. Any question he attempted to create became moot when he was held by the Oklahoma Supreme Court to have been illegally appointed and was prohibited. His appeal being from an order denying him leave to intervene and not from the decree,—and Saber's appeal being from an order denying his intervention and not from the decree, such decree remained unappealed from, final and conclusive. Since neither McKinney nor Saber were permitted to get into the case, their appeals could not create a contingency on ownership,—and such appeals could not create a contingency on the payment to Martha by the December, 1920 contract. Thus the error in the Board's conclusion is self-evident.

The Board having correctly found that the 1920 stipulation "awarded the additional moneys out of the impounded funds to Martha Jackson" (Rec. 478), the Secretary's preventing *distribution* until Parmenter consented to modify the decree to direct *distribution* to the Superintendent created no contingencies on *payment.* Such delay merely continued the Receiver as trustee for Martha's additional money—as well as the money decreed to be due her under her valid sale contract—until *distributed* to another trustee. In

the meantime her title to and ownership of the money assigned, relinquished and transferred by the December, 1920 contract was as perfect and free from contingencies as her other money held in trust by the Receiver. The same decree perfected title to both sums of money.

Contingencies on income must be genuine before a taxpayer on the accrual basis is relieved of the duty of reporting such income. Conversely, contingencies on payment must be genuine before a taxpayer may be denied the right to deduct his expenses in determining net taxable income on the accrual basis. Also, contingencies on ownership of property or assets lost must be genuine and not ephemeral, flimsy or fantastic before deduction of such loss may be denied. This is a common sense rule.

The question—of whether payment to Martha Jackson is deductible in the year (1920) the funds were transferred, relinquished and assigned to her, or in the year (1921) the controversy between Parmenter and the Secretary terminated, or in the later year (1922) when actual *distribution* and physical delivery was made by the Receiver, as one trustee, to the Superintendent, as another trustee for Martha Jackson—is answered in petitioner's favor by the facts of the instant case.

After petitioner and his associates, by their December, 1920 contract, assigned, relinquished and transferred to Martha Jackson (not to McKinney, the Secretary, nor Parmenter) the $202,637.84 and conveyed and parted title with, and relinquished all control and dominion over, funds to which they had quieted and perfected title, and of which they had constructive possession, the controversy between Parmenter, McKinney and the Secretary—(subsequently narrowed to a controversy between Parmenter and the Secretary)—instead of creating a contingency *on payment* to Martha Jackson, or her ownership of the money paid— that

controversy, and the attitude of the contestants, refutes any contention or conclusion there was a contingency on *payment* to Martha Jackson. The contestants were all asserting the money paid was hers—and each was asserting his right to administer the money for her. With petitioner *disclaiming*, and Martha's legal representative and the others all *claiming* such money was hers by reason of unconditional transfer, there could be no contingency on *payment*. Certainly the purpose, intention, attitude and acts of Martha's legal representative and the other contestants should determine in the instant case that there was no contingency on such *payment*.

The controversy between McKinney and Parmenter and later between Parmenter and the Secretary was over the right to act in a representative capacity *only* for Martha, and not over a personal claim by one or another of those contestants against such funds. Regardless of which prevailed in, or the time required to settle, that controversy, Martha remained the assignee and transferee and owner of the transferred funds—and such funds were as securely held in trust for her by the Receiver pending settlement of that controversy as they could have been held by Parmenter, or as they were thereafter held by the Superintendent.

When Deductible.

The Secretary's demands being not only acknowledged, —but his "judgment" and order being complied with—regardless of the fact that his "judgment" and order was void, the December, 1920 payment to Martha was not only properly accruable and deductible as expense, in 1920, but also deductible as a loss immediately after the December, 1920 contract had been executed. Such payment was deductible as expense in 1920 in the usual course of business because it was made to prevent further delay in the distribution of the impounded funds, of which petitioner and asso-

ciates were the owners and had constructive possession and for which the Receiver was trustee. *Kornhauser* v. *United States, supra; Bliss* v. *Commissioner, supra; Commissioner* v. *Wurts-Dundas, supra; Lucas* v. *Wofford, supra; Atwater Kent Mfg. Co.* v. *Commissioner, supra; Frank & Seder Co.* v. *Commissioner, supra;* and *Illinois Central Co.* v. *Commissioner, supra.*

The relinquishment of the funds was an immediate loss because petitioner and associates were entitled to distribution of their funds under the final decree of a court of competent and exclusive jurisdiction. Certainly no benefits were derived by petitioner and his associates from the "judgment" and order of the Secretary and his arbitrary acts in enforcing the same. The loss was sustained to avoid the loss incident to a lawsuit with the Secretary to determine the invalidity of his acts in preventing *distribution,* and the further loss of use of such impounded income, and is obviously deductible as a loss in 1920. *Seuffert Bros.* v. *Lucas, supra; F. W. Darling* v. *Commissioner, supra; Dayton Co.* v. *Commissioner, supra; United States* v. *S. S. White Dental Mfg. Co., supra; Commissioner* v. *Brown, supra;* and *Rhodes* v. *Commissioner, supra.*

It was never contemplated in the making of Martha Jackson's sale contract, nor in the later construing contract, nor provided by the court's decree, that there should be distributed to Martha Jackson the consideration for her sale of her unestablished and unadjudicated claim prior to distribution of the impounded funds to the owners, nor that by such earlier distribution Martha Jackson should escape paying one-eighth of the entire receivership administration expenses.

When the Secretary interferred and required that Martha Jackson be relieved of such administration expenses, and those expenses were, by the December, 1920 contract,

assumed and charged to the residue of petitioner's, Brazell's and Johnson's impounded funds, three-eighths of such expenses, *computable as of December, 1920, were properly deductible by petitioner in 1920, on the accrual basis,* notwithstanding the exact amount was not known.

On the *cash basis* three-eighths of Martha's one-eighth of all the expenses actually paid by the Receiver up to January 1, 1921, were, under the December, 1920 contract, properly deductible by petitioner in filing his tentative returns for 1920, *had petitioner been on the cash basis. Being and contending that he was on the accrual basis, three-eighths of one-eighth of the entire receivership administration expenses up to final distribution, including taxes and all other charges charged to Martha Jackson by the final decree, were properly accruable and deductible in 1920 by petitioner in addition to the money transferred directly to Martha Jackson.*

POINT 3.

The Circuit Court's Opinion and Decision herein should be reversed and Propositions I and II should be decided by this Court to eliminate conflict in the Opinion and Decision herein of the Tenth Circuit Court with the opinions of other Circuit Courts of Appeals and of this Court, and to eliminate great confusion and multiplicity of suits in the application of the Revenue Acts, Rules and Regulations, and in the construction thereof by other taxpayers, by the Bureau of Internal Revenue, by the Board of Tax Appeals, and by other Circuit Courts of Appeals.

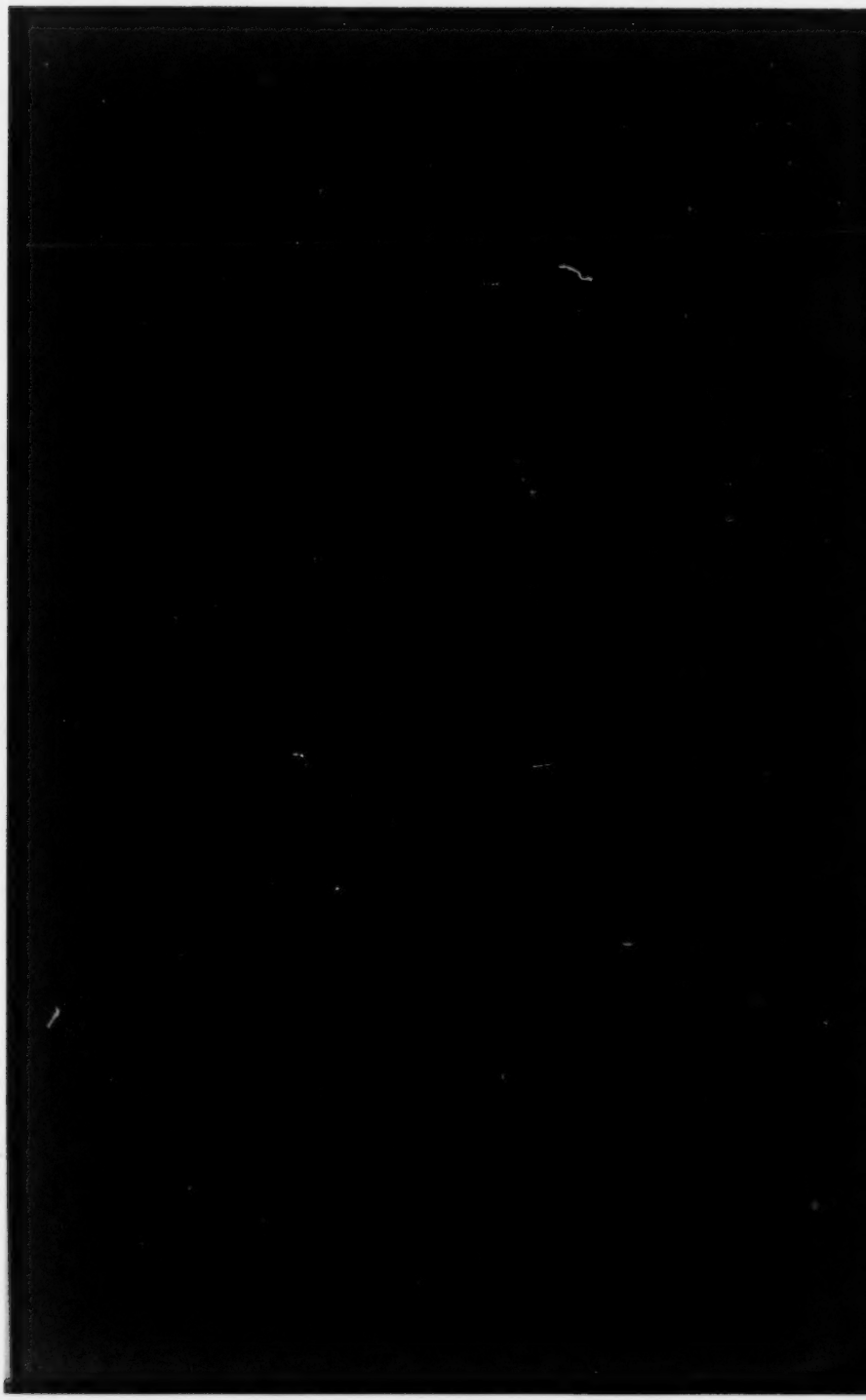
The foregoing Point 3 is self-demonstrative and requires no elaboration. Should this Court not grant the writ herein prayed for and reverse the Circuit Court's and the Board's decisions herein, the confusion that will result to all taxpayers, to the lower courts, to the Board of Tax Appeals, and to the Bureau of Internal Revenue in the construction and application of the Revenue Acts and Rules

and Regulations is self-evident,—and multiplicity of suits will follow.

Petitioner respectfully urges that the decisions of both the Circuit Court and the Board of Tax Appeals in the instant case should be reversed and the deduction in controversy should be allowed.

Respectfully submitted,

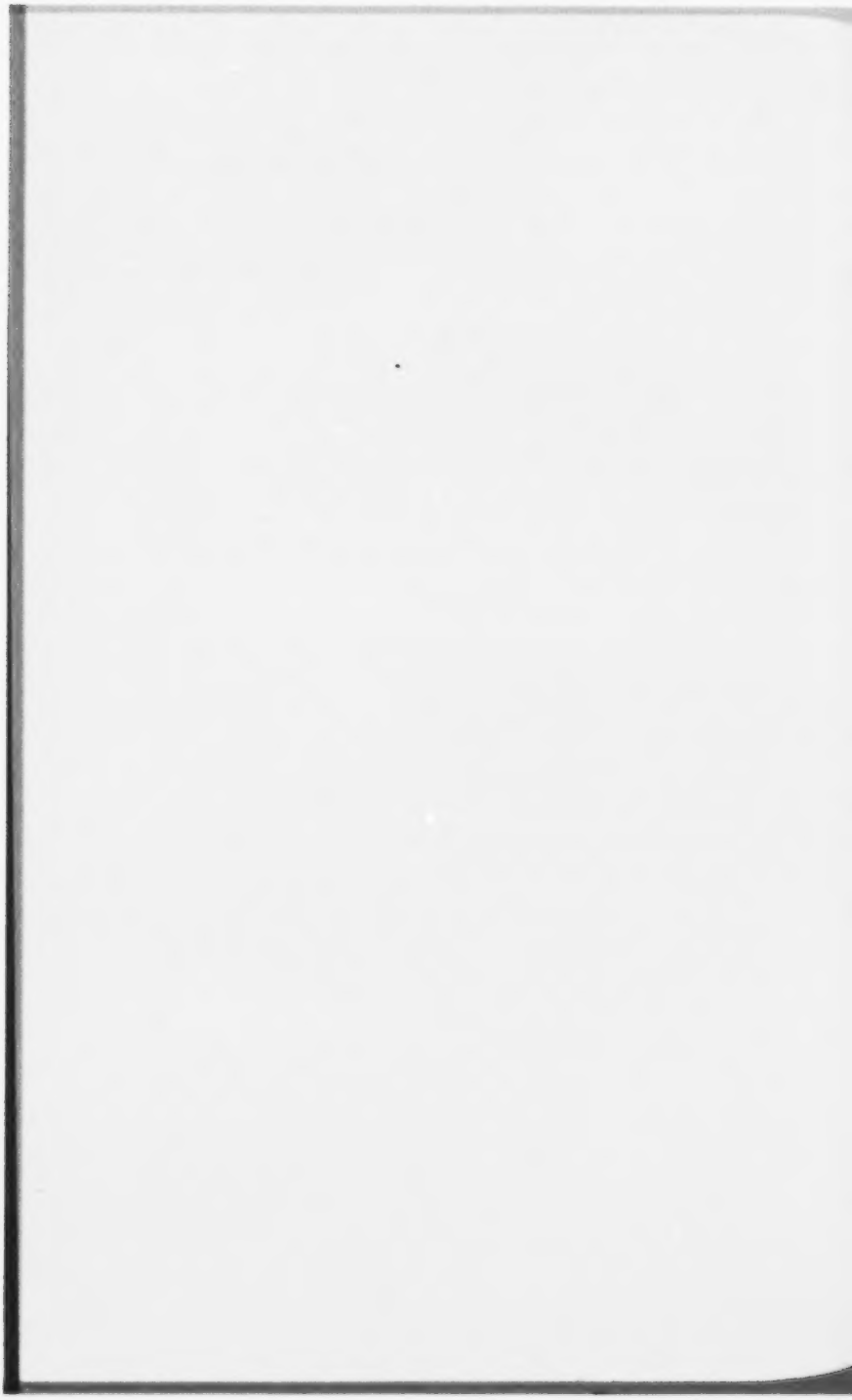
O. O. OWENS, Petitioner,
Pro Se.



INDEX

CITATIONS

462759—42



In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1184

O. O. OWENS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 468–481) in this proceeding is unreported. Two previous opinions of the Board (R. 51–59, 90–101) which related in part to the issues herein are likewise unreported. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 645–651) is reported in 125 F. (2d) 210.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 13, 1942. (R. 652.) Peti-

tion for rehearing, filed February 12, 1942 (R. 655–689), was denied February 26, 1942 (R. 690). The petition for writ of certiorari was filed April 28, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the petitioner sustained a deductible loss, or in the alternative incurred a deductible expense, of $75,989.20, in the taxable year 1920. Specifically, the questions are—

1. Whether the expenditure alleged to have been made by the petitioner was a capital outlay, rather than a deductible loss or expense.

2. Whether the item in question was in any event not deductible in 1920 since it was paid in 1922 and since petitioner was on the cash basis of accounting.

3. Whether even if the petitioner kept his books on the accrual basis of accounting, the item was nevertheless not deductible in 1920, since it did not accrue until 1921 or 1922.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries

or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only as to such transactions within the United States;

* * * * *

STATEMENT

The sole issue in this case is whether petitioner is entitled to a deduction of $75,988.20 from his gross income for the year 1920, as a loss, or otherwise. That amount represents petitioner's asserted share in certain impounded oil royalties which were relinquished by him and his associates in 1922 to one Martha Jackson, an incompetent, pursuant to an agreement (executed October 22, 1921) which was approved by a court order in 1922. The facts out of which this controversy arose are

complex, but for present purposes they may be summarized as follows:

In 1902 an allotment of land in Oklahoma was made to Barney Thlocco, a full-blooded Creek Indian. It appears, however, that Thlocco had died prior to the allotment, and upon the discovery of oil the United States brought suit in 1913 to cancel the allotment and recover the lands for the benefit of the Creek Nation. Over 200 persons appeared in the litigation as defendants, claiming to be heirs or successors of heirs of Thlocco. A receiver was appointed in 1914, and he leased the lands to an oil company at a specified royalty which was to be paid into court to be accumulated for distribution to those who should ultimately be determined to be entitled thereto. This Court finally held on May 21, 1917, that the United States could not cancel the allotment. *United States* v. *Wildcat,* 244 U. S. 111. There then remained for the lower courts the problem of determining who among the various defendants might be entitled to the land and the impounded royalties. (R. 469–470.)

Among those who asserted claims of heirship were one Saber Jackson, who claimed a life estate by curtesy, and his daughter Martha Jackson, who claimed a fee simple. (R. 470.) In 1916 Saber Jackson had sold his interest to the petitioner herein and two associates. (R. 470.) Moreover, on July 9, 1917, one Parmenter, acting as the guardian of Martha Jackson, contracted

with an agent of the petitioner and his associates to convey her interest in the lands and impounded funds, in consideration of $12,000 cash plus 25 per cent of such of the impounded funds as should ultimately be adjudged to belong to her; the purchasers also undertook to prosecute her claim and to defeat or acquire all adverse claims. (R. 470.) On July 9, 1917, the impounded royalties amounted to $698,836.89. (R. 470.) On February 26, 1918, petitioner and his associates transferred their interests to the lessee oil company, which in turn assumed the obligation of the purchasers to Martha Jackson. On that day the impounded funds amounted to $893,365.94, and the oil company together with an assignee expended $395,480.34 in carrying out those obligations. (R. 470–471.)

As a result of dissatisfaction of the Department of the Interior with the contract of July 9, 1917, in respect of the amounts payable to Martha Jackson, the petitioner and his associates on May 11, 1918, entered into a supplemental contract which provided that she should receive $111,870.74 of the impounded royalties plus one-eighth of the funds that should be accumulated thereafter. (R. 471–472.)

On June 17, 1919, the District Court entered a decree in which it adjudged that Martha Jackson was the sole heir of Thlocco, that she was, on June 9, 1917, the owner of the allotment, subject only to Saber Jackson's curtesy estate, and that

she was also the owner of the impounded royalties. It further decreed that by reason of the conveyances, petitioner and his associates together with their assignees had succeeded to her interest. (R. 472.) Meanwhile, Saber Jackson attempted to intervene, seeking to set aside his 1916 conveyance on the ground of fraud, and Martha Jackson also attempted to intervene through another guardian challenging the validity of her contracts and conveyances on the ground of fraud. On September 9, 1919, the District Court denied both applications for intervention. (R. 472.) An appeal was taken from the rulings of the District Court, and while that appeal was pending, the Secretary of the Interior promulgated an order setting forth that the contract of May 11, 1918, had not been approved by him or the Interior Department, and that Martha Jackson's interest in the impounded funds as of the date of her conveyance was equal to approximately $325,000. (R. 473.) That order was promulgated May 6, 1920, and petitioner and his associates thereafter, on October 22, 1921, entered into a further supplemental agreement with Martha Jackson and the oil company whereby it was agreed that she should receive $308,000 of the impounded funds, an amount computed so as to comply with the order of the Secretary of the Interior. (R. 310–313, 473.) On March 25, 1922, the Circuit Court of Appeals sustained a motion asking for the reform of the District Court's de-

cree in accordance with the terms of that supplementary contract, and remanded the cause with directions that the decree be modified so as to comply with the terms of the contract. (R. 473, 522.) It was thus ordered that $308,000 be paid out of the impounded funds for the use of Martha Jackson. *M'Kinney* v. *Black Panther Oil & Gas Co.*, 280 Fed. 486 (C. C. A. 8th).[1]

In September 1922, $318,261.04 was paid out of the impounded funds for the benefit of Martha Jackson. On February 3, 1923, the Circuit Court of Appeals entered an order adjudicating the rights of Saber Jackson, and on May 29, 1923, the District Court entered a final order, disposing of all matters in controversy. (R. 474.)

The amount ($75,989.20) which petitioner seeks to deduct from his gross income for 1920 represents his allocable share of the additional amount paid to Martha Jackson under the supplemental contract of October 22, 1921, which was ultimately approved.[2]

---

[1] On the same day the Circuit Court of Appeals affirmed another judgment of the District Court ruling that one Saley was not an heir of Thlocco. *Saley* v. *Black Panther Oil & Gas Co.*, 280 Fed. 496 (C. C. A. 8th).

[2] The record does not show just how petitioner computed his deduction. It was probably computed roughly as follows: The agreement of May 11, 1918, provided that $111,870.74 of the impounded royalties be paid to Martha Jackson, and the later agreement approved by the Circuit Court of Appeals raised that amount to $308,000. Petitioner stated that he had a three-eighths interest in the enterprise, and the

The Board sustained the Commissioner's determination denying the deduction (R. 481), holding (1) that petitioner, who did not keep any regular books of account, was on the cash basis of accounting and could not deduct in 1920 any amounts in fact paid out in 1922; and (2) that even if he were on the accrual basis, his liability under the new agreement had not become definitely fixed until 1922 with the consequence that it could not be accrued in 1920. (R. 477–481.) The Circuit Court of Appeals affirmed upon still another ground, namely, that in any event, such additional amount was at most expended in the acquisition of a capital asset and was therefore not deductible at all.

ARGUMENT

The peculiar facts of this case do not raise any question calling for further review. There is no conflict, and the decision is correct on any one of the three grounds relied upon below.

1. Assuming, *arguendo,* that the petitioner may be treated as having made the outlay in question, it was plainly no more than a capital expenditure. It represented at most only additional consideration that was paid to acquire Martha Jackson's interest, and was therefore not deductible at all. The decisions cited by the court below on this is-

---

amount claimed by him as a deduction is roughly three-eighths of the difference between those two amounts. (R. 477.)

sue (R. 650–651) amply sustain its conclusion, and to those decisions may be added the following: *Brush-Moore Newspapers, Inc.* v. *Commissioner,* 95 F. (2d) 900 (C. C. A. 6th), certiorari denied, 305 U. S. 615; *Colony Coal & Coke Corp.* v. *Commissioner,* 52 F. (2d) 923 (C. C. A. 4th); *Hutchings* v. *Burnet,* 58 F. (2d) 514 (App. D. C.); *Blackwell Oil & Gas Co.* v. *Commissioner,* 60 F. (2d) 257 (C. C. A. 10th); *J. I. Case Co.* v. *United States,* 32 F. Supp. 754 (C. Cls.). There are no decisions to the contrary, notwithstanding petitioner's bald assertion that the decision herein is in conflict with the very cases relied upon by the court.

2. Moreover, the Board found that petitioner was on the cash basis of accounting and that he did not keep any regular books on the accrual basis. (R. 478.) The record fully justifies that conclusion. Accordingly, since the amount in question was not paid to Martha Jackson until 1922, it could not be deducted in 1920 by one on the cash basis.

3. Finally, even if the amount were otherwise deductible and even if petitioner were on the accrual basis, the item did not accrue in 1920. Petitioner claims that the contract giving rise to that additional liability was executed on December 5, 1920. (Pet. 19, Br. 27, 31, 61, 69–89.) But that contract was entered into with one McKinney, an alleged guardian of Martha Jackson, and was not

the contract which formed the basis for the 1922 judgment. (R. 279, 283, 285.) The contract which formed the basis for the judgment was entered into with Martha Jackson's duly appointed guardian, Parmenter, and was executed on October 22, 1921. (R. 310–313.) Accordingly, even if petitioner were on the accrual basis, the liability in question could not have accrued prior to 1921. Petitioner is therefore not entitled to any deduction for 1920.

CONCLUSION

The decision below is correct on any one of at least three theories. There is no conflict. The petition should be denied.

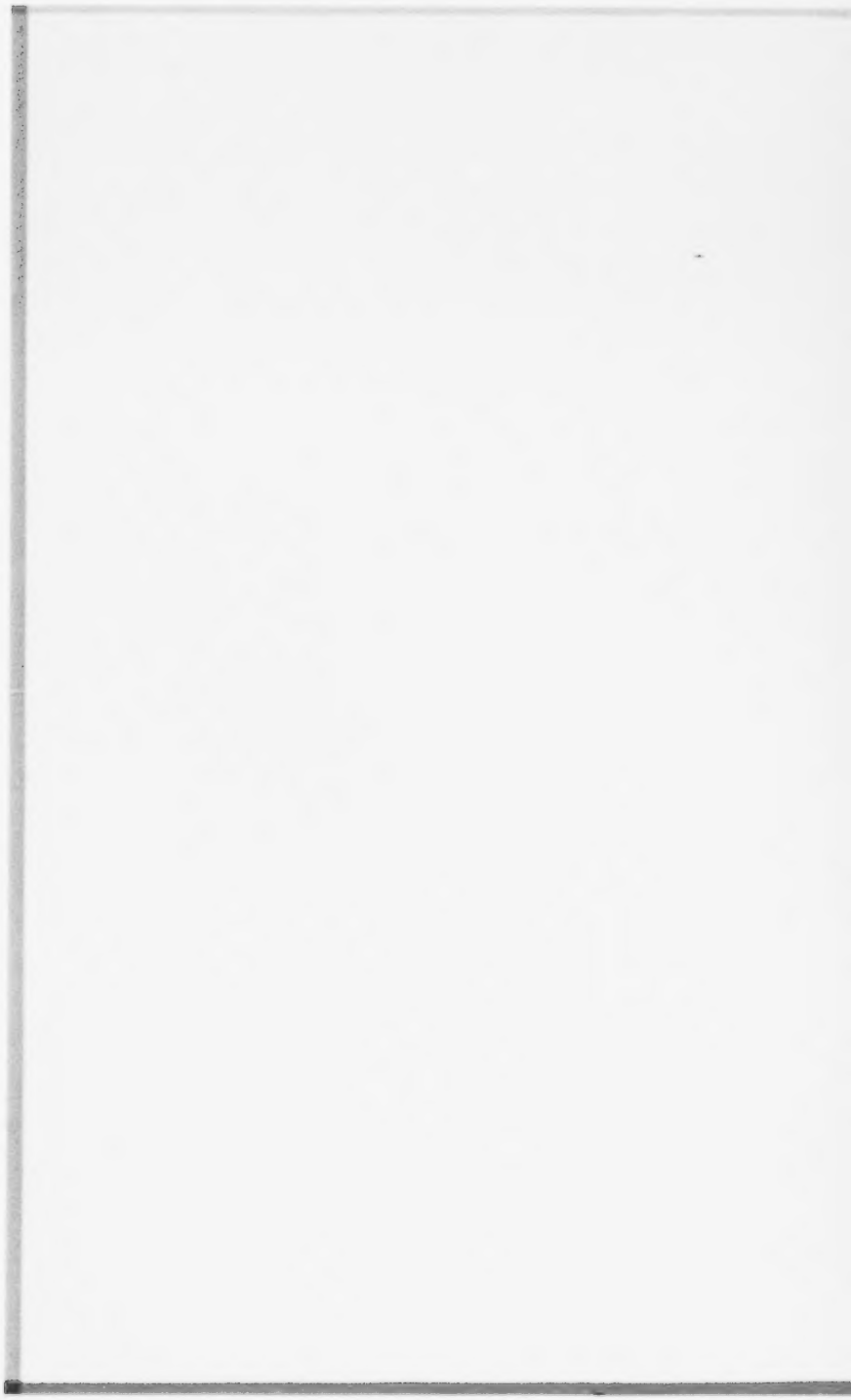
CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
CARLTON FOX,
Special Assistants to the Attorney General.

MAY, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942



(10)

No. 1184

In the Supreme Court of the United States

October Term, 1941.

O. O. OWENS, *Petitioner,*

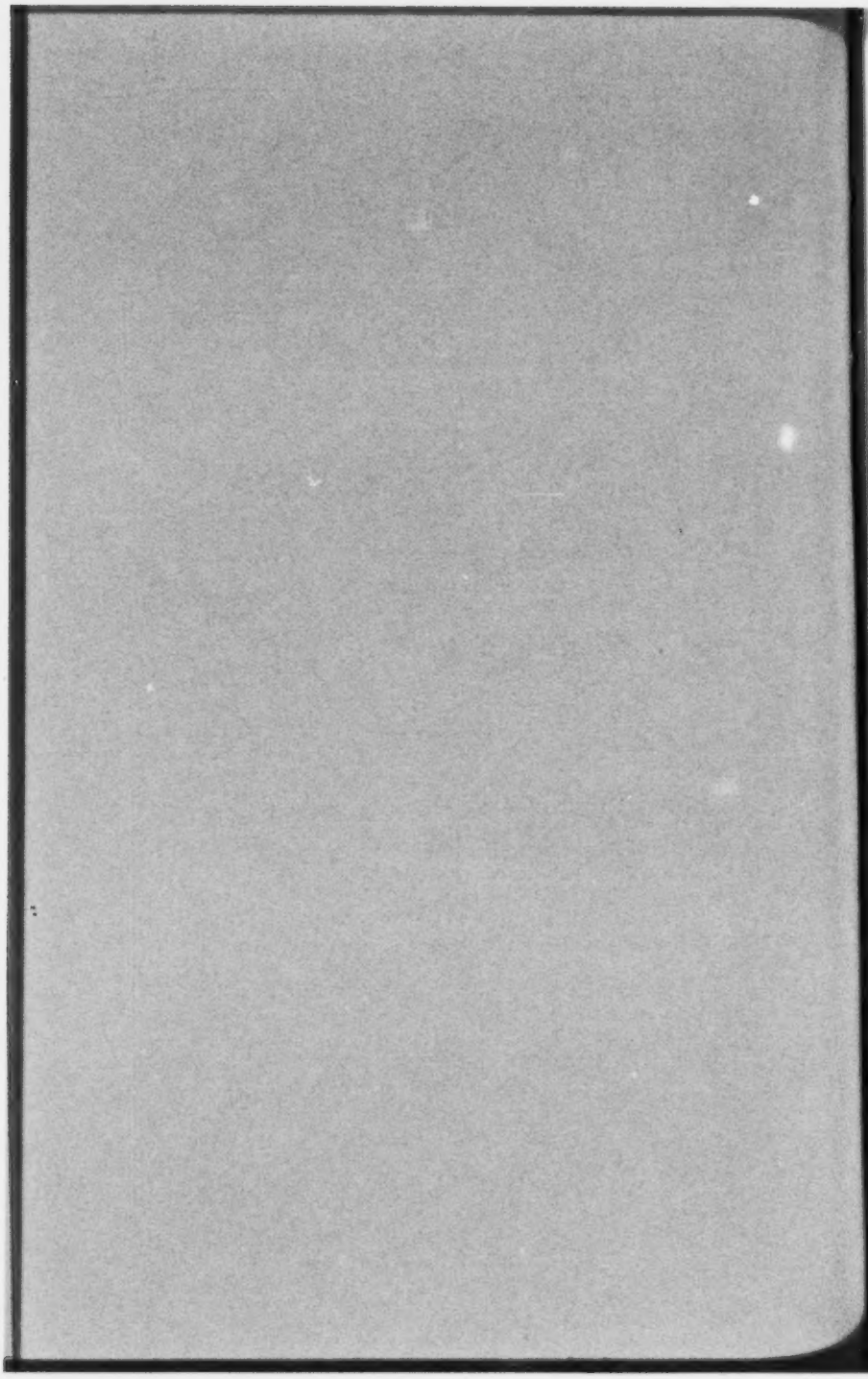
vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Reply to Respondent's Brief in Opposition.

O. O. OWENS,
Petitioner,
Pro Se.

Tulsa, Okla.



INDEX.

TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. 1184

O. O. OWENS, *Petitioner,*

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

Explanatory Note.

Petitioner on this the 1st day of June, 1942, at 10 o'clock a. m., received a telegram from the Clerk of this Honorable Court stating:

> "Court has not passed on motion to defer consideration *Owens* case. Necessary your reply brief reach this office by June 5th."

Such requirement limits the consideration petitioner could otherwise give to Respondent's Brief in Opposition, which brief was received by petitioner on the afternoon of May 29th, 1942, and such restriction also limits the care in the preparation of this reply brief that should be and would otherwise be given by petitioner.

For convenience and time-saving, petitioner will follow the sequence of Respondent's Brief in Opposition.

Mis-statements by Respondent and Petitioner's Corrections and Explanations.

Respondent's "Questions Presented":

In respondent's brief, page 2, he states:

> "Specifically, the questions are—
>
> * * * * * * * *
>
> "*2.* Whether the item in question was in any event not deductible in 1920, *since it was paid in 1922* and since petitioner was on the cash basis of accounting.
>
> "*3.* Whether even if the petitioner kept his books on the accrual basis of accounting, the item was nevertheless not deductible in 1920, *since it did not accrue until 1921 or 1922.*" (Italics ours.)

The first quoted statement to the effect that the item in question "was paid in 1922" completely ignores and disregards the record, and is in direct conflict with the Board's Opinion (R. 478) wherein the Board explicitly defined the substance *of the December, 1920, contract with McKinney* as *"(which awarded additional moneys out of the impounded funds to Martha Jackson)."*

An "award" of additional moneys is so obviously a payment that no discussion and no supporting authorities for such an elementary proposition are required.

The second above quoted statement to the effect that the amount was not deductible "* * * since it did not accrue until 1921 or 1922" also conflicts with the record. In his brief (pp. 71-90, incl.) in support of Petition of Writ of *Certiorari*, petitioner demonstrated perfectly that the Board in its Opinion confused *payment* with *distribution; that the payment not only accrued but also was made by the December, 1920, contract in consequence of which such payment is de-*

ductible in 1920 on either the cash or accrual basis of accounting and reporting income; that the Receiver *paid* only his administration expenses; that he *distributed* to the owners thereof the residue of all impounded funds.

In his "Statement" respondent makes one correct statement or admission, *i. e.,* (respondent's brief, pp. 3 and 4) *"The facts out of which this controversy arose are complex."* (Italics ours.) Respondent's admission that the facts are complex more than justifies the lengthy petition and supporting brief filed by petitioner, in which petition the facts are correctly stated and in which brief the issues of fact and law are clearly explained and distinguished.

Unfortunately respondent, in his "Statement," relied only upon the Board's Memorandum Opinion *before the same was revised by Board Order entered November 30, 1940* (R. 522-523). In consequence thereof, respondent has mis-stated or misconstrued the facts, some of which errors should be called to this Honorable Court's attention.

On pages 4 and 5 of his brief respondent asserts:

> "Moreover, on July 9, 1917, one Parmenter, acting as the guardian of Martha Jackson, *contracted* with an agent of the petitioner and his associates *to convey her interest* in the land and impounded funds, in consideration of $12,000 cash plus 25 per cent of such of the impounded funds as should ultimately be adjudged to belong to her; * * *." (Italics ours.)

Respondent omits to say that Martha Jackson's guardian not only *contracted* to sell *but on the same day he sold and conveyed, in the manner provided by law and with the approval of the proper County Court,* Martha Jackson's unestablished, unadjudicated and contested claim *not only to the land but also to the then impounded funds and all funds accumulating thereafter.*

The above quoted statement was evidently intended by respondent to be construed with respondent's later statements about the construing contract of May 11, 1918, (Jt. Ex. A-1; R. 295-296, offered R. 186-187), and the Secretary's Order (Pet. Ex. 5; R. 314-316, offered R. 207), which statements coupled with the fact that a full-blood Indian was involved, was evidently intended by respondent to leave the impression with this Honorable Court that Parmenter's contract to sell Martha Jackson's "interest" was invalid or void without the Secretary's approval, in consequence of which *(according to respondent's theory)* petitioner never acquired title to the impounded funds until the transactions and all contracts relating thereto were approved by the Secretary, notwithstanding the final decree of a court of competent and exclusive jurisdiction rendered June 17, 1919.

Upon that theory, respondent apparently seeks to convey the impression that the Secretary's assertions that he had not approved the construing contract of May 11, 1918, *supra,* and the Secretary's demands upon the Black Panther Company for payment to Martha Jackson of royalty, constituted an adverse claim against petitioner's title to and his right to possession of his portion of the impounded funds, and that the removal of such adverse claim would require a capital investment and therefore not be deductible. This fallacy is exploded and demolished in its entirety by petitioners brief in support of his petition.

Respondent further states (Res. brief, p. 5):

> "On February 26, 1918, *petitioner and his associates transferred their interests* to the lessee oil company, which in turn assumed the obligation of the purchasers to Martha Jackson." (Italics ours.)

This statement is obviously wrong. Had "*petitioner and his*

associates transferred their interests'' on February 26, 1918, they would have entirely passed out of the transaction in 1918 and this tax controversy for the year 1920 would never have existed.

Respondent further states (Res. brief. p. 5):

> *''As a result of dissatisfaction* of the Department of the Interior with the contract of July 9, 1917, in respect of the amounts payable to Martha Jackson, the petitioner and his associates on May 11, 1918, entered into a supplemental contract which provided that she should receive $111,870.74 of the impounded royalties *plus one-eighth of the funds that should be accumulated thereafter.* (R. 471-472)'' (Italics ours.)

This statement does violence not only to the record but also to the Board's Opinion which respondent seeks to defend. The language in the Board's Opinion (R. 471-472) is as follows:

> "The Department of the Interior entertained the veiw that the contract of July 9, 1917, was *ambiguous and uncertain* as to the amounts Martha was to receive. Because of the intercession of representatives of the Department of the Interior in the Martha Jackson transaction, on May 11, 1918, Owens, Brazell and Johnson, acting through Kelly, their agent, and the Black Panther Co., entered into a supplemental contract with Parmenter, as guardian of Martha Jackson, *which construed the contract of July 9, 1917,* as provided that Martha Jackson should receive $111,870.74 of the impounded royalties *and in addition thereto one-eighth of the funds that should be accumulated by the receiver between March 31, 1918, and the date of the final determination of her interest by the District Court,* * * *."* (Italics ours.)

Respondent's inexcusable omission and mis-statement tends to create the impression that Martha Jackson should

receive a continuing royalty of one-eighth of the funds thereafter accumulated by the Receiver, *without limitation as to term*, whereas the Board's Opinion reads distinctly to the contrary, and the trial court's decree (Jt. Ex. B-2, R. 305, offered R. 187-188) expressly states: " * * * *plus 25% of one-eighth of the proceeds derived from said land between the 31st day of March, 1918, and this date,* * * * " —"this date" being the date of the decree, June 17, 1919.

Evidently respondent seeks to create the impression by his above quoted statement that the deduction here in controversy represented a portion of the amount due, *as a continuing royalty*, to Martha Jackson as "sole heir," and also *as a part of the consideration for the sale of her contested, unestablished and unadjudicated claim*,—and by so doing respondent attempts to make it appear that the payment was a part of the purchase price or cost of acquisition of a capital asset and therefore not deductible.

In his brief (p. 5) respondent states: "On June 17, 1919, the District Court entered a decree in which it adjudged that Martha Jackson was the 'sole heir' of Thlocco * * *," which statement is in direct conflict with the decree of the trial court (Jt. Ex. B-2, R. 297-309, offered R. 187-188), in which the words "sole heir" are not to be found. Other than this reference respondent gives no effect to such decree,—again demonstrating respondent's theory that the court determined that Martha was the "sole heir" of Thlocco, and as such and being a full-blood Indian, the Secretary could and did adjudicate her interest in the estate,—notwithstanding the other provision of the decree admitted by respondent.

Evidently respondent at this late date labors under and attempts to create the impression with this Honorable Court,

that Martha Jackson perforce was the "sole heir" of Barney Thlocco, otherwise she could not have participated in the transaction as she did,—and that she could act only with the approval of the Secretary,—and without such approval of her conveyance the final decree of the District Court was effective only to determine Thlocco's heirship.

In his brief (pp. 31-54) petitioner exhaustively demonstrated that the title to the Thlocco estate *was created in Martha Jackson, AS TRUSTEE, by settlements, compromises and purchases,* and that she received the amount agreed upon as consideration for the sale of her unestablished, unadjudicated and contested claim, and that she received nothing as a reserved interest; also that the payment here in controversy was made long after the final decree of a court of exclusive jurisdiction (which remained unappealed from), had quieted and perfected petitioner's title to and awarded him possession of the impounded funds, which were subsequently assigned, relinquished and transferred to Martha Jackson.

Respondent (brief, p. 6) further states: "Meanwhile, Saber Jackson attempted to intervene, * * * and Martha Jackson also attempted to intervene through another guardian * * *." Respondent omits to state that *Martha Jackson did not attempt to intervene,* but that McKinney, claiming through invalid appointment to be her guardian, sought to intervene but was denied leave and the right (Pet. Ex. 20, R. 632, 640, offered R. 278) *to get into the case,* in consequence of which the aforesaid decree remained final and undisturbed.

Respondent also omits to state that Parmenter, the legal guardian, not only recognized the decree rendered June 17, 1919, as being final and as properly adjudicating the amount

due Martha Jackson for the sale of her claim to the estate, but that in February, 1920,—prior to the time the Secretary entered his "judgment" and Order,—Parmenter commenced and thereafter successfully prosecuted his petition for writ of prohibition against McKinney and the County Court which made his pretended appointment as guardian of Martha (Pet. Ex. 20, R. 640, 641, offered R. 278) in consequence of which McKinney's attempt to intervene and to appeal were a nullity and created no claim adverse to petitioner's title to his portion of the impounded funds.

Respondent (brief, p. 6) further states:

> "*An appeal was taken from the rulings* of the District Court, and while that appeal was pending, the Secretary of the Interior promulgated an order setting forth that the contract of May 11, 1918, had not been approved by him or the Interior Department, and that Martha Jackson's interest in the impounded funds as of the date of her conveyance was equal to approximately $325,000.00. (R. 473)"

Again respondent avoids making a clear statement by not indicating who took the appeal and that the sole purpose of the appeal was for leave *to get into the case*, and unless and until such appeal had been decided in favor of McKinney in his pretended capacity as guardian (which it never was), neither his appeal nor that of Saber Jackson could possibly disturb the finality of the decree.

Respondent, in his statement above quoted, attempts to create the impression that the failure of the Secretary of the Interior to approve the contract of May 11, 1918, was a fatal defect and, as a consequence, an adverse claim against petitioner's title to the impounded funds was created by McKinney's and Saber Jackson's appeals, and continued to exist until March 25, 1922.

Petitioner, in his brief (pp. 32-54) in support of his Petition for Writ of *Certiorari*, demonstrated clearly and exhaustively that the Secretary's Order of May 6, 1920 (Pet. Ex. 5, R. 314-316, offered R. 207), was *void ab initio* and created no claim adverse to petitioner's title; that it was directed exclusively against the Black Panther Company, as the owner of the Martha Jackson lease executed in 1913 by Martha's guardian to J. Coody Johnson, which lease was subsequently assigned to the Black Panther Oil and Gas Company, and that company as lessee therein and owner thereof was exclusively liable for any royalty that might be due thereunder,—but that no title was conveyed by such lease and no oil or gas was ever produced thereunder, in consequence of which the Secretary's demands against the Black Panther Company were unenforcible had he had jurisdiction and authority to promulgate his order,—and still more important, that petitioner, having never owned or claimed an interest in said lease, could by no process of reasoning or by the most fantastic stretch of the imagination be liable for any royalty to Martha Jackson.

Furthermore, the very language of the order itself reveals that it was not intended by the Secretary to operate against petitioner, except to prevent distribution of any of the impounded funds until his demands for *payment* had been complied with by the Black Panther Company and his further demands in respect of *distribution* had been complied with by Martha's guardian.

The language of the Secretary's Order reads:

> " * * * that the said J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, and all persons claiming by, through, or under them, or any of them, are conclusively estopped from denying that the said Martha Jackson is entitled to receive less than

> the full one-eighth royalty mentioned in the lease so executed by her guardian, * * * ."

Petitioner claimed nothing by, through or under J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, or any other persons claiming by, through or under them. On the contrary, petitioner had relinquished the Saber Jackson claim *to the Black Panther Company;* he acquired nothing from the Black Panther Company nor from J. Coody Johnson, in consequence of which petitioner was not included within the intent and purpose of the Secretary's Order.

Again respondent (brief, p. 6) further states:

> "That order was promulgated May 6, 1920, and petitioner and his associates thereafter, on October 22, 1921, entered into *a further supplemental agreement* with Martha Jackson and the oil company whereby it was agreed that she should receive $308,000 of the impounded funds, an amount computed so as to comply with the order of the Secretary of the Interior. (R. 310-313, 473.)"

The statement, coupled with the preceding statement immediately above quoted, is obviously intended by respondent to create the impression that the Secretary, notwithstanding the final decree of a court of competent and exclusive jurisdiction, and notwithstanding that under the law the Secretary had no authority whatever to act in the premises, properly proceeded to adjudicate the matter and to determine Martha Jackson's "interest," and in so doing he created a claim adverse to petitioner's title, and that the cost of removing such purported claim would perforce be a capital investment and therefore not deductible. Petitioner's brief heretofore filed demonstrates the fallacy of respondent's theory.

However, respondent again *entirely ignores the December, 1920, contract with McKinney by which payment was made to Martha Jackson,* and ignores that part of the Board's Opinion (R. 478) in which the Board explicitly defined the substance of the December, 1920, contract as "*(which awarded additional moneys out of the impounded funds to Martha Jackson),*" and again (R. 479) where the Board in its Opinion held: "* * * there is no question that Martha Jackson could have claimed nothing under *the 1920 contract* * * *.*"

Moreover, respondent inadvertently admits the existence of such contract by his language "*a further supplemental agreement.*" A further supplemental agreement can only mean that a preceding supplemental agreement had been made. The record (Pet. Ex. 17, R. 337-340, offered R. 277) discloses that prior to May, 1921,—five months before execution of the Supplemental Contract of October 22, 1921, relied upon exclusively by respondent,—stipulations relating to a previously executed agreement had theretofore been filed in the Circuit Court, and *that pursuant to such prior agreement* (which was the contract of December, 1920) *and such stipulations* the attorneys for the contesting guardians stipulated, without the participation or approval of their guardian clients,

> "* * * that the sum of money agreed to be paid to the said Martha Jackson as per stipulation for settlement filed in the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, now impounded in the hands of the Receivers in the said cause, shall be paid by such Receivers to the Superintendent for the Five Civilized Tribes for supervision and disbursement under the rules and regulations of the Department of the Interior." (Pet. Ex. 17, R. 338-339, offered R. 277.)

Such exhibit, coupled with the Board's findings and conclusions (R. 478, 479), demonstrate beyond all possible doubt the existence, purpose, substance and effect of the December, 1920, contract with McKinney. Nevertheless respondent makes no mention whatever of such contract until the closing paragraph of his brief, reference to which comment will hereinafter be made.

Respondent's obvious purpose in omitting all comment about or reference to the December, 1920, contract is to make it appear that no agreement was made until October 22, 1921, in consequence of which the deduction here in controversy could not be claimed for the year 1920. In other words, respondent's position is that the payment was made in just any year except 1920.

Again respondent states (brief, p. 7): "*It was thus ordered that $308,000.00 be paid* out of the impounded funds for the use of Martha Jackson." Here again respondent assumes that *payment* was made by court order and not by contract,—and respondent confuses *payment* with *distribution* inasmuch as there had been unconditionally assigned, relinquished and transferred to Martha by the December, 1920, contract, a sufficient amount in excess of that due her under her valid sale contracts and the final decree to equal $308,000.00,—*and in addition thereto, she had been relieved of her one-eighth of the entire receivership administration expenses,*—no reference to which is made by respondent. The receiver *distributed* such money. He *paid* only his administration expenses.

Again respondent (brief, p. 7) emphasizes the Saber Jackson claim by stating: "On February 3, 1923, the Circuit Court of Appeals entered an order adjudicating the rights of Saber Jackson, * * *" but fails to correctly state

or admit that such order could not and did not in any manner affect petitioner because on October 7, 1918, (R. 199) petitioner and his associates had conveyed without warranty the Saber Jackson claim to the Black Panther Company in consideration of the performance by the Black Panther Company of the contract of February 26, 1918 (R. 197-199), in consequence of which nothing that Saber Jackson did and nothing that may have developed out of his attempt to intervene or to appeal could have adversely affected or did affect petitioner's portion of the impounded funds.

Respondent includes a footnote (on page 7 of his brief) directing this Honorable Court's attention to the case of *Saley* v. *Black Panther Oil & Gas Co.*, 280 Fed. 496 (C. C. A. 8th). Such footnote was evidently intended to create the impression that another adverse claim or contingency on petitioner's interest in, and portion of, the impounded funds existed. An examination of such opinion will reveal that Saley sought to intervene but was required to make a *prima facie* case upon her petition before the trial court would disturb the decree; that she failed and the trial court held that her claim was fraudulent and a fabrication in its entirety; that she was not the daughter of Barney Thlocco, but was the daughter of Chepan Taledege and as such had participated in Taledege's estate, in consequence of which the trial court refused not only to permit Saley *to get into the case* with her fraudulent claim, but also refused to disturb the decree. Certainly the denial of leave and the right to intervene, with a fraudulent claim, in a suit in which a final decree had been rendered could create no adverse claim to or contingency on the ownership of the estate, and we are at a loss to understand respondent's purpose in even referring to such matter.

Respondent (brief, p. 7) states:

> "The amount ($75,989.20) which petitioner seeks to deduct from his gross income for 1920 *represents his allocable share of the additional amount paid to Martha Jackson under the supplemental contract of October 22, 1921, which was ultimately approved.*"

Again respondent ignores the December, 1920, contract and refers exclusively to the contract of October 22, 1921, because the same was approved, still relying upon the theory that the Secretary of the Interior had jurisdiction in the matter, and ignoring the fact that regardless of the further fact that the McKinney contract was not approved by the Secretary of the Interior, Parmenter immediately asserted his right as legal guardian to administer such additional money; that he was estopped to assert the Secretary's demands (Pet. Ex. 20; R. 641, offered R. 278), but that after the contract had been made with McKinney and the money was unconditionally assigned, relinquished and transferred to Martha, Parmenter was not only in position, but it was his legal duty also, to assert his right to administer such additional money,—and he did so.

Furthermore, Parmenter vigorously and successfully prosecuted his petition for writ of prohibition against McKinney, and when McKinney was finally estopped from further interference with the administration of Martha's estate, for convenience in procedure a supplemental agreement (with Parmenter substituted therein for McKinney) was executed, so that the final decree of June 17, 1919, could be modified as demanded by the Secretary to provide that Martha's money,—not only that paid to her by the December, 1920, contract "(which awarded additional moneys out of the impounded funds to Martha Jackson)" (Board's findings, R. 478), but also the sum due her under her sale con-

tract and the court's final decree rendered June 17, 1919,—*could be distributed* to the Superintendent instead of, as the law required, to Parmenter, the legal guardian.

With McKinney prohibited, with Parmenter still the duly qualified and acting guardian of Martha and, after December 5, 1920, asserting his right to administer the "additional moneys awarded out of the impounded funds to Martha Jackson," and with Martha Jackson's sale contract and the construing contract of May 11, 1918, providing that the consideration for her unestablished and unadjudicated claim should be paid to her guardian, as the law required, and with the Secretary demanding that the decree be reformed to provide for *distribution* to the Superintendent instead of to Parmenter, obviously it was necessary to prepare another contract, with McKinney omitted and Parmenter substituted for him, to accomplish such purposes.

Furthermore, it was also necessary in order for petitioner and his associates and the Black Panther Company to protect themselves against any claims or demands by Parmenter, as Martha's legal guardian, which he might make as the result of Martha's money being distributed to the Superintendent instead of to Parmenter, to modify the construing contract of May 11, 1918, which situation and conditions clearly demonstrate the reasons for the provisions of the Supplemental Contract of October 22, 1921.

Respondent ignores the fact that *had the December, 1920, contract with McKinney not been made there would have been no basis for the Supplemental Contract of October 22, 1921.* McKinney had been prohibited by the Oklahoma Supreme Court in March, 1921. His petition for rehearing had been denied in September, 1921 (Pet. Ex. 20; R. 640, 641, offered R. 278). *Until he was prohibited McKinney was the only person who could assert the Secretary's demands. Mott*

v. *United States,* 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385. In McKinney's claimed capacity as guardian of Martha petitioner and his associates dealt with him and made the contract of December 5, 1920. By unconditionally assigning, relinquishing and transferring to Martha,—not to McKinney,—the additional money, Martha's estate was correspondingly larger, the Receiver held correspondingly more for her and less for petitioner and his associates, and Parmenter not only had, but asserted, his legal right to administer such money. Parmenter was the only person who could make an agreement, binding upon Martha Jackson, for her money to be *distributed* to the Superintendent, as demanded by the Secretary, instead of being *distributed* to Parmenter, as the law required. When the facts in this case are understood, respondent's position is immediately demonstrated to be wrong in its entirety.

Except for the fact that petitioner and his associates had, by the December, 1920, contract, with McKinney, unconditionally assigned, relinquished and transferred the additional money to Martha Jackson, it would have been an act of insanity to make the contract of October 22, 1921, because on that date McKinney was not in position, he having been prohibited, to assert the demands of the Secretary. The Secretary could not assert them *(Mott* v. *United States, supra),* neither could Parmenter, since he was estopped. Therefore it is patently clear that on October 22, 1921, when the supplemental contract (Jt. Ex. C-3; R. 310-314, offered R. 190) was made, the December, 1920, contract "(which awarded additional moneys out of the impounded funds to Martha Jackson)" (R. 478, 479) was in full force and effect, otherwise the Supplemental Contract of October 22, 1921,—the sole purpose of which was to provide for the modification of the decree to comply with the Secretary's demand *in respect*

of distribution to the Superintendent instead of to Parmenter,—would never have been executed because on that date there was no one to assert the Secretary's demands.

On page 7 of his brief respondent includes a second footnote referring to petitioner's computation. In printing the record in the Circuit Court, petitioner's computation was not printed in proper sequence in consequence of which it was not understandable. In his brief filed with the Circuit Court, petitioner included his corrected computation printed in proper sequence so that it would be easily understood. Such computation, with appropriate explanations, is included herewith as an appendix for the convenience of this Honorable Court.

On page 8 of his brief, respondent asserts:

> "The Board sustained the Commissioner's determination denying the deduction (R. 481), holding (1) that petitioner, who did not keep any regular books of account, was on the cash basis of accounting and could not deduct in 1920 any amounts in fact paid out in 1922; * * *."

Respondent does not admit what the record clearly shows, *viz:* that the Board's finding above referred to was based exclusively, *on the evidence given at the November, 1939, continued hearing* at Washington, and that such evidence *in respect of books, records and the method of keeping them,—(other than the single statement by petitioner that in 1920, he opened up and has since continuously kept a regular set of books),—was based exclusively on the testimony of the partners, W. E. Gayer and O. O. Owens, about the books and records of the partnership of Gayer & Owens for 1919 and prior years.*

Respondent fails to state or admit that the record con-

clusively shows that in the April, 1939, hearing at Tulsa, stipulations were made between the attorneys for petitioner and respondent which materially reduced the claimed deficiency. Logic and reason make clear that with a deficiency exceeding $36,000.00 for the year, 1920, in controversy, *at a hearing on the merits in April, 1939,* petitioner's books and records must have been exhibited, and scrutinized with exceeding care by respondent, otherwise respondent would not have admitted the deductibility of the second item claimed as a deduction in the original petition filed with the Board and two new or additional issues raised by petitioner at such April, 1939, hearing, which deductions were made by stipulation. (R. 164-165)

No issue was ever raised by respondent as to the sufficiency or correctness of the books and records kept by petitioner for the year, 1920. No evidence was offered by respondent that petitioner's books and records for 1920 were not complete, sufficient, proper and properly kept. On the contrary, the record reveals that in the hearing at Tulsa, Oklahoma, in *April, 1939,* petitioner's books for 1920 were specifically recognized and accepted by respondent as being regular, sufficient, proper and properly kept (R. 155-165), and that petitioner's *1920 books and records* offered at that hearing were accepted by respondent as establishing petitioner's contentions in respect of the deductibility of the second item or issue pleaded in his original petition and the two new or additional items, issues or transactions in 1920 not theretofore pleaded. Upon such proof, *established by petitioner's books,* such three items, totaling $13,211.18, were conceded by respondent to be deductible, and were by stipulation deducted. (R. 164-165)

The only allusion in this entire case to the character or lack of correctness, completeness or regularity of petition-

er's books and records for 1920 was made in the Memorandum Opinion of the Board. After first finding "petitioner, in 1920, filed an individual income tax return upon which was stated that petitioner either kept no books or that such books, if kept, were on a cash basis, * * *" the Board, after referring to the obviously erroneous statement on the face of petitioner's incomplete tentative returns as "an ambiguous answer," concluded that no "proper" books were kept by petitioner in 1920.

The Board first concluded:

> "But what has been established, in effect, is that no proper
> /books were kept. Therefore, under either conclusion, it appears that the respondent's contention must prevail. A taxpayer who keeps no books or records of account cannot be on an accrual basis. Cf. *John A. Brander,* 3 B. T. A. 231; *Sam Greengard,* 8 B. T. A. 734, affirmed 29 Fed. (2d) 502, and *Daniel Hecker,* 17 B. T. A. 874, petition for review denied by the Circuit Court of Appeals, 7th Circuit, April, 1931. There is no convincing proof to the contrary."

The Board's first conclusion, "But what has been established, in effect, is that *no* books were kept," so obviously referred to testimony relevant to the books and records of the partnership for 1919 and prior years, and was such a captious distinction between "books" and "records" that such conclusion was (by interlineation) revised to read: "But what has been established, in effect, is that no *proper* books were kept." (Emphasis ours.)

After making its first conclusion that *no* books were kept, the Board, by its later statement, "There is no convincing proof to the contrary," concluded the evidence relevant to *the partnership's books and records for 1919 and*

prior years was not sufficiently convincing to refute the obviously erroneous statement on the face of petitioner's incomplete tentative returns that petitioner was on the cash basis.

After first concluding that *no* books were kept, and citing a supporting authority for a simple proposition, the Board, by revising its opinion to recite that "no *proper* books were kept," and by not eliminating the cited supporting authority, indulged in self-destroying reasoning and statements.

An authority in support of the conclusion, "A taxpayer who keeps *no* books or records of account cannot be on an accrual basis," certainly cannot be considered in point and applicable to a conclusion that no *proper* books were kept, even though the conclusion was based upon evidence relevant to petitioner's books for 1920. But where such conclusion is based exclusively upon evidence relevant to the books and records of the partnership for 1919 and prior years, the conclusion is not only erroneous, but the cited authority is not in point, and both the conclusion and cited supporting authority are not applicable to the facts nor to the case presented.

With petitioner contending that his books were kept on the accrual basis and presenting new issues or items for deduction, and with his books and records for 1920 in evidence in the *April, 1939, hearing* to support such deductions, petitioner's contention that he was on the accrual basis for reporting his 1920 income must have been asserted and his books and contention must have been considered and approved before respondent conceded that the three items or transactions were deductible,—and which, when deducted (R. 164-165), reduced the claimed deficiency more than 20%.

The question of whether the petitioner's books and records for 1920 were regular, proper and properly kept having been disposed of in the *April, 1939, hearing* at Tulsa, by respondent's conceding the correctness of petitioner's contention in respect of the deductibility of the three issues, two of which were new issues (R. 164-165), there was no reason or occasion for such books or for further evidence about such books and records being offered *in the continued hearing in November, 1939, at Washington, D. C.,* inasmuch as the only issue to be heard by the Board at such November, 1939, continued hearing was the deductibility of the $75,-989.20 here in controversy.

Respondent exacted an agreement (R. 164, 476), as a condition to the hearing being continued from April, 1939, to the Washington calendar in November, 1939, that petitioner would raise no new issues. If petitioner's books for 1920 had not been approved by respondent as establishing the deductibility of the two new issues, there would have been no reason to require the agreement not to raise additional new issues,—*because without books for 1920, additional new issues could not be established*,—and the agreement about new issues would have been wholly unnecessary and, in fact, not thought of.

All the evidence in the record relating to books, records and method of keeping them (other than the single statement that in 1920 petitioner opened, and has since continuously kept, a regular set of books), was that given at the November, 1939, continued hearing at Washington, and related, exclusively, to the books and records of the partnership of Gayer & Owens for 1919 and prior years and to the method of keeping them.

That partnership had been dissolved in the latter part of 1919. Its old books and records had been lost or de-

stroyed. The evidence was offered for the purpose of showing that the income or profits of the partnership was determined by increase in net worth, which conformed, in fact, with the accrual basis of accounting; that the partners each reported, as their net taxable income, one-half the increase in net worth of the partnership; that petitioner, by having thus reported his income for 1919 and prior years on the accrual basis of accounting,— and having never sought from, or been granted leave by, respondent to change, was therefore, required to report his income for 1920 on the accrual basis and, in fact, did so, notwithstanding the obviously incorrect statement on the face of his incomplete tentative returns filed for 1920.

It was upon such evidence in respect of the books and records of the partnership for 1919 and prior years, that the Board concluded (R. 477): "It is the finding of the Board *that the 1920 return was not on the accrual basis.*" There fore, based upon the testimony in respect of the partnership's books and records for 1919 and prior years,—which books could not be offered in evidence after such great lapse of time,—the Board concluded (R. 478):

> "But what has been established, in effect is that no proper books were kept. * * * A taxpayer who keeps no books or records of account cannot be on an accrual basis. * * * No books of account are in evidence which would bear on petitioner's contention, and the records which were mentioned at the hearing, though not produced, do not give an indication that they were kept either as regular books of account or on an accrual basis."

Upon such facts, clearly revealed by the record, and upon the Board's oblique finding "that the 1920 return was not on the accrual basis," respondent bases his positive as-

sertion, "that petitioner, who did not keep any regular books of account, was on the cash basis of accounting and could not deduct in 1920 any amounts in fact paid out in 1922."

On page 8 respondent further asserts:

> "* * * and (2) that even if he were on the accrual basis, *his liability under the new agreement had not become definitely fixed until 1922* with the consequence that it could not be accrued in 1920. (R. 477-481)" (Italics ours.)

Petitioner, in his brief in support of his petition for Writ of *Certiorari* and hereinabove, has demonstrated that *the liability not only accrued, but payment was made, in 1920.* Thus the error in the Board's conclusion is self-evident.

However the Board's conclusion (R. 479):

> "To substantiate the contention of a loss on the accrual basis, it must be shown that the money became due from the taxpayer in the taxable year. So long as there remains a contingency as to its payment, it cannot be said to have definitely become due in that year. * * * In the facts of this proceeding it will be noted that Martha Jackson was to be paid only from the impounded funds. If it had been finally adjudged in 1922 that Martha Jackson's claim to the Thlocco grant was not valid, there is no question that Martha Jackson could have claimed nothing *under the 1920 contract* because there would have been no impounded funds from which Martha would have had a right to be paid. It is thus evident that throughout the years 1920 and 1921 and up until March 25, 1922, there was always a contingency on petitioner's assumed obligation. That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal." (Italics ours.)

is completely demonstrated on pages 85-88 of petitioner's

brief in support of his petition,—and by the court's decree, (Ex. B-2; R. 297-309, offered R. 187-188), which quieted and perfected petitioner's title to, and awarded him possession of, his portion of the impounded funds,—to be erroneous.

The 1922 appeal referred to can only be the appeal of McKinney from the trial court's order denying him leave or right to intervene,—to get into the case,—or the appeal of Saley from the trial court's order denying her leave to intervene,— to get into the case,—with her fraudulent claim. Since the trial court refused to permit either McKinney or Saley to intervene, and further refused to disturb the decree, the Board's confusion of the facts and the error in its conclusion,—"That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal"—is manifestly self-evident.

On page 8 respondent asserts:

> "The Circuit Court of Appeals affirmed upon still another ground, namely, *that in any event, such additional amount was at most expended in the acquisition of a capital asset and was therefore not deductible at all.*" (Italics ours.)

Such language is a decided elaboration upon, and strengthening of, the Circuit Court's conclusion. The Circuit Court held (R. 650):

> "It may be assumed, without deciding, that the order of the Secretary of the Interior fixing the amount due Martha was ineffective for want of authority to promulgate it. Still, the Secretary asserted the authority to promulgate it, and when it had been promulgated, petitioner and his associates elected to transfer, relinquish and assign to Martha a portion of the impounded funds *in order to adjust the matter and effectuate a distribution of the entire fund.* * * * But what ever may

have been the basis of the return, accrual or cash, the amount transferred, relinquished and assigned to Martha was a capital outlay and therefore was not deductible * * *." (Italics ours.)

In the instant case the expression "*to adjust the matter*" is a duplication of and means identically the same as the words "*effectuate a distribution,*" since effectuation of distribution of his impounded funds *was the only object sought by petitioner, and petitioner's only purpose in making such payment.*

Since the purpose "to adjust the matter" was identically the same as to "effectuate a distribution" in the instant case, it follows without argument that the matter to be adjusted was not the acquisition of a capital asset, or acquiring new property, the enlargement of an interest in, or the removal of an adverse claim to property already owned, but was solely for the purpose of expediting distribution of impounded income, title to which had been quieted and perfected by final decree, unappealed from, of a court of exclusive jurisdiction, and possession of which had been awarded by such decree, and the Circuit Court's conclusion is obviously erroneous.

In his brief in its entirety, petitioner demonstrated there was no adverse claim to or contingency on his portion of the impounded funds. Nowhere in the record can support be found for an assertion that petitioner acquired any additional or enlarged interest in the Thlocco Estate. On the contrary, his portion of the impounded funds was diminished by $75,989.20, and nothing in return was received therefor. No adverse claim was removed, no perfection of title resulted, no benefits were derived by petitioner, but only an absolute loss resulting from such payment was sustained by

petitioner. How then could petitioner have made a capital investment or "capital outlay" since he paid the amount in controversy to expedite distribution of earned income, with title thereto quieted and perfected and possession awarded by final decree, unappealed from?

Respondent's "Argument":

On page 8 in his "Argument," respondent asserts:

> "*1.* Assuming, arguendo, that the petitioner may be treated as having made the outlay in question, *it was plainly no more than a capital expenditure. It represented at most only additional consideration that was paid to acquire Martha Jackson's interest,* and was therefore not deductible at all." (Italics ours.)

Before the Circuit Court respondent asserted that the payment *was additional consideration for the land.* Here he asserts it was "additional consideration that was paid to acquire Martha Jackson's 'interest,' * * *." Interest is what? Martha had, in a lawful manner, sold and conveyed her unestablished, unadjudicated and contested claim to the estate. Pursuant to contracts title was subsequently created in her, *as trustee.* The final decree of a court of exclusive jurisdiction quieted and perfected that title so created, and awarded possession of the funds to petitioner and his associates.

The Secretary's demands were for *payment* of *royalty* and directed against the Black Panther Company, as lease owner, solely liable for any royalty that might be due thereunder if the lease had been valid and conveyed inherited title when executed. Petitioner had already acquired, in a lawful manner, Martha Jackson's claim and all her right, title and interest, if any, in and to the entire estate. With the Secretary's demands being directed against the Black Pan-

ther Company and intended to require that company to pay royalty to Martha Jackson out of that company's interest in the impounded funds, how could petitioner, for the sole purpose of expediting distribution of his portion of the impounded funds, be said to have paid "additional consideration * * *to acquire Martha Jackson's 'interest' * * *," in satisfying the demands of the Secretary directed against the Black Panther Company? The question answers itself.

A casual study of the record will disclose the object and purpose of the Secretary in promulgating his order. J. Coody Johnson, the attorney, had acquired the Jackson leases in 1913 as consideration for his services in attempting to establish Martha Jackson as the heir of Thlocco. If he failed he would, of course, get nothing, because the leases would be of no value (Ex. 20; R. 633, offered R. 278). Those leases had been assigned to the Black Panther Company.

It is obvious that the Secretary concluded that the Black Panther Company assumed Johnson's obligation; that inasmuch as the Black Panther Company had not been permitted to develop the property under the Jackson leases, but had availed itself of the opportunity of developing the property under the Receiver's lease and, in so doing, had paid a royalty of one-fourth to the Receiver;—and since petitioner and his associates retained only one-half the funds impounded by the Receiver at final distribution and a royalty thereafter of one-eighth, the Black Panther Company should be required to pay to Martha Jackson and to Saber Jackson such additional one-eighth royalty relinquished by petitioner and saved by that company, as provided by its contract (R. 197-199) with petitioner and his associates.

Therefore, it is perfectly clear that the purpose of the Secretary's Order was to require the Black Panther and Bay State Companies, as the owners of the Jackson leases,

to pay to Martha and Saber Jackson, to the dates of their respective sales July 9, 1917, and July 6, 1916, such additional one-eighth royalty, notwithstanding his purpose had no merit in law.

On pages 7 and 8 respondent asserts:

> "The decisions cited by the court below on this issue (R. 650-651) amply sustain its conclusion, and to those decisions may be added the following: *Brush-Moore Newspapers, Inc.*, v. *Commissioner*, 95 F. (2d) 900 (C. C. A. 6th), *certiorari* denied, 305 U. S. 615; *Colony Coal & Coke Corp.* v. *Commissioner*, 52 F. (2d) 923 (C. C. A. 4th); *Hutchings* v. *Burnet*, 58 F. (2d) 514 (App. D. C.); *Blackwell Oil & Gas Co.* v. *Commissioner*, 60 F. (2d) 257 (C. C. A. 10th); *J. I. Case Co.* v. *United States*, 32 F. Supp. 754 (C. Cls). There are no decisions to the contrary, notwithstanding petitioner's bald assertion that the decision herein is in conflict with the very cases relied upon by the court."

All the above cited cases, except *Blackwell Oil & Gas Co.* v. *Commissioner*, were cited by respondent in his brief filed in the Circuit Court in this case. Without exception, the cases of

> *Brush-Moore Newspapers, Inc.*, v. *Commissioner*, 95 F. (2d) 900 (C. C. A. 6th), *certiorari* denied, 305 U. S. 615;
>
> *Colony Coal & Coke Corp.* v. *Commissioner*, 52 F. (2d) 923 (C. C. A. 4th);
>
> *Hutchings* v. *Burnet*, 58 F. (2d) 514 (App. D. C.); and
>
> *J. I. Case Co.* v. *United States*, 32 F. Supp. 754 (C. Cls.).

involve the acquisition, improvement or development of capital assets, and the claimed deductions were accordingly denied.

Such four cases fall in the same classification as the cases (except that of the *First National Bank in Wichita* v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283) cited by the court in support of its decision,—which cases were also cited by respondent in his brief filed in the Circuit Court.

In *Colony Coal & Coke Corp.* v. *Commissioner, supra,* at 52 F. (2d) 924, the court clearly defines a capital asset and enumerates the elements thereof. All such elements are absent from the instant case. Extremely significant is the court's language: "The taxpayer has acquired property of permanent value * * * ." No such condition exists in the instant case. Here the capital assets had been previously acquired, title thereto had been quieted and perfected, and possession of the impounded funds had been awarded, by final decree, unappealed from, of a court of exclusive jurisdiction.

The above cases cited by respondent and those cases (except *First National Bank in Wichita* v. *Commissioner, supra,),* cited by the court in support of its opinion (which were also cited by respondent in his brief filed in the Circuit Court) clearly involve the acquisition of a capital asset. Being such class of cases and in the instant case there being clearly no acquisition of a capital asset, it is obvious and clear, and accordingly petitioner reasserts with confidence his conviction that the cases cited by the court and also by respondent are in direct conflict with the decision of the Circuit Court in the instant case.

Expense sustained to acquire prompt distribution of impounded funds, title to which has been quieted and perfected, and possession thereof has been awarded, by final decree, unappealed from, of a court of exclusive jurisdiction is no different from a like expense incurred in removing a

squatter, unlawfully in possession of property, or expense incurred in removing a non-rent-paying tenant from property unquestionably owned by the landlord. The same question,—actual possession of the property or premises,—is involved in the instant case that would be involved in the hypothetical cases of removing a squatter or a non-rent-paying tenant. Respondent's Rules and Regulations provide, and all the cases on the subject hold, that in such instances expense incurred is deductible.

The case of *Blackwell Oil & Gas C.* v. *Commissioner,* 60 F. (2d) 257 (C. C. A. 10th), is the only case cited by respondent that even approaches, and it does not come close to, the instant case.

In the *Blackwell* case the taxpayer was denied deductions in two transactions. A part of one of the claimed deductions was so obviously a capital investment as to be self-demonstrative, but the balance of the claimed deduction, if identified as to amount, was properly an expense,—but since the part that was expense could not be identified by the record, the whole of the claimed deduction was denied.

The first issue in the *Blackwell* case involved a deduction claimed by the Blackwell Company in defending a suit for specific performance brought against the majority stockholders of the company who had signed an option to sell their stock. The brokers in the transaction sued ten of the directors and principal stockholders of the Blackwell Company and alleged that the defendants entered into a conspiracy and combination to prevent the carrying out of the option agreement and the consummation of the sale.

The board of directors of the company adopted a resolution in which they recited it was the duty of the company to pay the costs and expenses of such suit, and save the de-

fendants therein harmless from any judgments rendered and resolved that the company should pay all such costs and expenses and pay and satisfy any judgment. Thereafter the parties to such action compromised the same by the payment to the plaintiffs of a substantial sum of money, and in 1923 the company paid such amount in full settlement of such suit.

The Tenth Circuit Court sustained the denial of the deduction on the ground, *first,* that the cause of action was predicated upon an alleged conspiracy to which the corporation was not a party; that the plaintiffs charged that a conspiracy existed, which if true was unlawful, and the deduction was denied on the ground that the directors, as such, of the company had no authority to enter into an unlawful conspiracy, and *second,* that the amount paid by the company in the compromise was neither an ordinary or necessary expense of the corporation.

In his brief petitioner demonstrated that the deduction here in controversy was an ordinary and necessary expense made in the course of this business and solely to expedite distribution of his impounded income in order that such income might be used in the future conduct and operation of petitioner's business, and further, to avoid the loss of the use in his business of such impounded income, and also to avoid the exepense and loss of the use of such income pending a long drawn-out lawsuit, between other parties (Parmenter and the Secretary), groundless in law, but which would have continued for a long time because of the amount involved.

On page 9 respondent further asserts:

> "*2.* Moreover, the Board found that petitioner was on the cash basis of accounting and that he did not keep

any regular books on the accrual basis. (R. 478) *The record fully justifies that conclusion.* Accordingly, since the amount in question was not paid to Martha Jackson until 1922, it could not be deducted in 1920 by one on the cash basis." (Italics ours.)

Respondent's assertion that "The record fully justifies that conclusion" has hereinabove been sufficiently refuted. His further statement, "Accordingly, since the amount in question was not paid to Martha Jackson until 1922 * * *" has, in petitioner's brief in support of his petition and herein, been demonstrated to be based upon a confusion of *payment* with *distribution;* that the money was *paid* by the December, 1920, contract with McKinney, and that after petitioner and his associates, by the December, 1920, contract, unconditionally assigned, relinquished and transferred to Martha Jackson such additional money, the Receiver held more in trust for her and less in trust for petitioner and his associates until 1922, when the Receiver, as one trustee, *distributed* to the Superintendent, as another trustee for Martha, instead of to Parmenter, her legal guardian, the money not only assigned, relinquished and transferred by the December, 1920, contract, but also the money due her under her valid sale contract and the final decree of the District Court; that pending the controversy between the Secretary, McKinney and Parmenter, subsequently narrowed to a controversy between the Secretary and Parmenter, the Receiver, as Martha Jackson's trustee, held such additional money as securely and safely in trust for her as it could have been held by either Parmenter or the Superintendent.

On page 9 of his brief, respondent asserts:

"*3.* Finally, even if the amount were otherwise deductible and even if petitioner were on the accrual basis, the item did not accrue in 1920. Petitioner claims that

the contract giving rise to that additional liability was executed on December 5, 1920. (Pet. 19, Br. 27, 31, 61, 69-89.) *But that contract was entered into with one McKinney, an alleged guardian of Martha Jackson, and was not the contract which formed the basis for the 1922 judgment.* (R. 279, 283, 285) The contract which formed the basis for the judgment was entered into with Martha Jackson's duly appointed guardian, Parmenter, and was executed on October 22, 1921. (R. 310-313) Accordingly, even if petitioner were on the accrual basis, the liability in question could not have accrued prior to 1921. Petitioner is therefore not entitled to any deduction for 1920." (Italics ours.)

That such argument is self-destroying reasoning has been fully demonstrated herein and also in petitioner's brief in support of his petition. That Martha Jackson was paid the additional money is conceded. The fact that McKinney's contract was not approved by the Secretary has been demonstrated to be immaterial since the Secretary had no jurisdiction to approve it. The fact that McKinney was the only man who could assert the Secretary's demands for *payment*, and the further fact that Martha Jackson got the full benefit of the December, 1920, contract, and that Parmenter, the legal guardian, immediately asserted his right to administer the additional money assigned, relinquished and transferred by the December, 1920, contract with McKinney, is the material, pivotal and decisive point in this case.

Such argument conclusively demonstrates respondent's desperation and his eagerness to utilize any unstable basis for support of his claims and assertions, demonstrated to be both groundless in fact and law in the instant case.

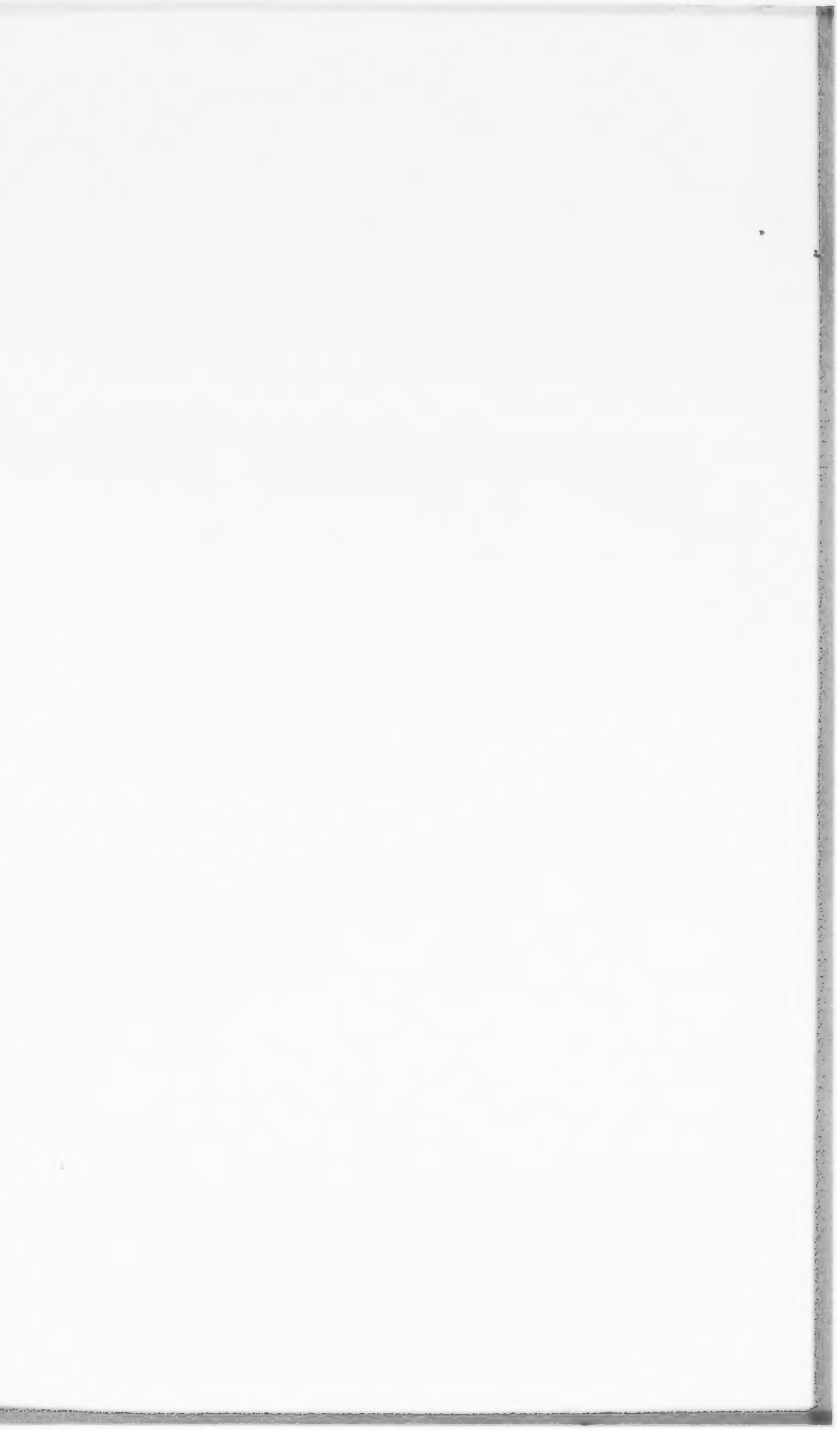
Conclusion.

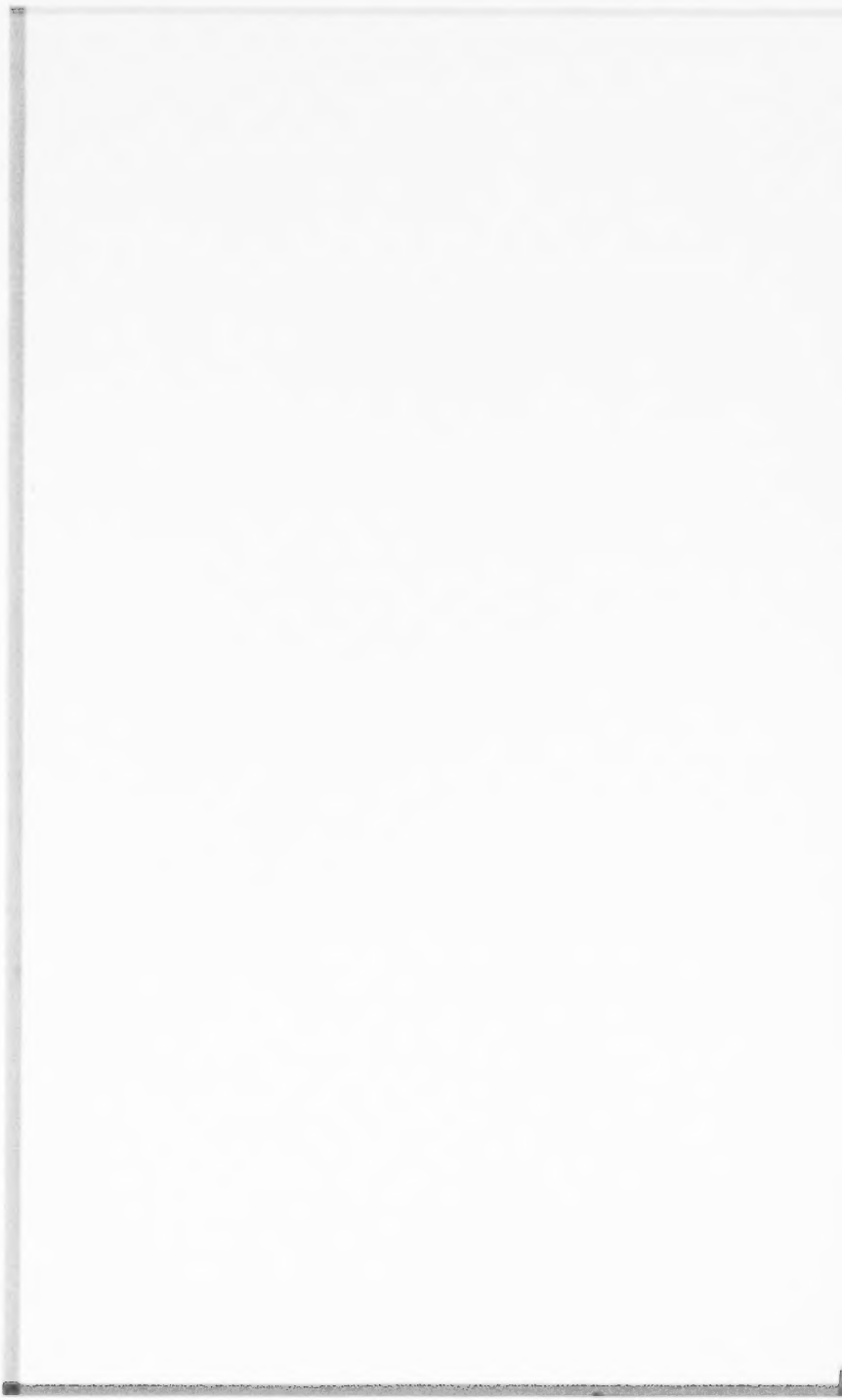
The fact that the facts in this case are complex, as admitted by respondent, did not justify respondent in the first instance in "guessing off" the issues herein and by "playing safe" to determine a ruinous deficiency against petitioner. The complexity of the facts does not justify the Board's decision based upon confusion of the facts and confusion of *payment* with *distribution.*

Such complex facts do not justify the Circuit Court's decision that the payment in controversy was a "capital outlay" or a capital investment where the record conclusively shows that petitioner acquired no new, or enlarged interest in, property, nor removed an adverse claim to property already owned,—but on the contrary, petitioner's interest was diminished as a result of such payment, and from which no benefits whatever were derived by petitioner, in consequence of which the transaction contained none of the elements of a "capital outlay" or capital investment.

Respectfully submitted,

O. O. Owens,
Petitioner,
Pro Se.





APPENDIX.

Due to the fact that, in printing the record, petitioner's computation was disarranged and not printed in proper sequence, the same is, for this Honorable Court's convenience, herewith reproduced.

In preparing such computation for filing with the Board petitioner's accountant erroneously used the amount of $318,589.81 (revealed by the Receiver's final report filed in July, 1923) instead of $308,000.00, as having been paid in December, 1920, to Martha Jackson; and also credited Martha Jackson's account *as of December, 1920,* with one-eighth of the $33,401.17 refunded in *December, 1924,* by the Clerk of the District Court to the parties after ad valorem taxes had been adjusted and paid.

The difference between $308,000.00, the amount paid by the December, 1920, contract, and $318,589.81 (the amount shown by the Receiver's final report filed in July, 1923, to have been distributed to the Superintendent for Martha Jackson's benefit), represented interest on United States Liberty Bonds in which the funds impounded by the Receiver had been invested in 1920. Distribution was made by the Receiver to the Superintendent in Liberty Bonds. As a consequence, $10,589.81 interest on such bonds was distributed to the Superintendent.

In the absence of the December, 1920, contract, and in the event of distribution of the impounded funds in conformity with the decrees of June 17 and September 9, 1919, after impounding $100,000.00 with the Court Clerk to later pay ad valorem taxes, the net amount due Martha Jackson at final distribution in June, 1923 (and before the refund by the Court Clerk of $33,401.17), determined from a retrospective analysis of the Receiver's final report, is $103,089.48.

In the event of distribution to Martha Jackson conforming to the aforesaid decrees there would have later been

due and distributed to Martha Jackson one-eighth of the $33,401.17 refunded by the Court Clerk, or $4,175.14. Such refund to Martha Jackson would have been a transaction in a later year, which did not change the net amount due her in December, 1920, under her sale contract and the aforesaid decrees.

Petitioner's recomputation, based upon a retrospective analysis of the Receiver's final report (correctly computed after using the proper amounts of $103,089.48 due Martha Jackson in December, 1920, under the final decree, and $308,000.00 paid by the December, 1920, contract) leaves a total of $204,910.52 assigned, relinquished and transferred to Martha Jackson by the December, 1920, contract. Petitioner's three-eighths of such revised total amount equals $76,481.44, and with proper adjustments made throughout, such recomputation results in a net deficiency of $286.74, as shown by the following schedules:

PETITIONER'S COMPUTATION, DOCKET 14379.

Adjustments to Net Income.

Net income on which deficiency, as disclosed in deficiency notice dated February 13, 1926, was based:			$111,444.05
Deduct:			
(a) Profit on sale of leases	$4,830.95		
(b) Depletion on Jessee James Welsh Property	490.71		
(c) Smith-Shotwell Investment loss	7,889.52	$13,211.18	
(d) Loss, amount relinquished to Martha Jackson and lost by petitioner in effort to remove obstacle to use and enjoyment of in-			

come, per Schedule "A," attached:	76,841.44	
Total items adjusted, (a) to (d), inclusive		90,052.62
Net income as adjusted		$ 21,391.43

Explanation of Adjustments.

(a) and (b) These items represent additional deductions allowed pursuant to the agreement filed with the United States Board of Tax Appeals on April 13, 1939.

(c) This item represents an additional deduction allowed pursuant to the agreement filed with the Board on April 18th, 1939.

(d) Per Schedule "A" attached, based on the true facts correctly stated and stipulated and established in this case.

Computation of Tax.

Net income as adjusted		$ 21,391.43
Less: Personal exemption		2,600.00
Income subject to normal tax		$ 18,791.43
Normal tax at 4% on	$ 4,000.00	$ 160.00
Normal tax at 8% on	14,791.43	1,183.31
Surtax on $21,391.43		
on $20,000.00		710.00
on 1,391.43 (9%)		125.23
Total tax liability		$2,178.54
Income tax assessed and heretofore paid by petitioner, Account No. Dec. 300211		1,891.80
Deficiency in income tax		$ 286.74

SCHEDULE "A."

(In Support of Petitioner's Computation, Docket No. 14379.)

Computation of Amount of Money Relinquished and Paid to Martha Jackson, and Amount of Expense and Loss Sustained by O. O. Owens in Removing Obstacle to Use of Income in 1920.

Amount due Martha Jackson per court decree and contract				$111,670.74
Plus: 25% of 1/8 royalty interest from 3-31-18 to 6-17-19, *viz:*				
From Exhibit "F" Receiver's Report:				
25% Royalty Oil Revenue				
2nd quarter, 1918	$ 30,061.81			
2nd quarter, 1918	20,172.45	$ 50,234.26		
3rd quarter, 1918		43,253.96		
4th quarter, 1918		43,045.63		
1st quarter, 1919		33,380.75		
2nd quarter, 1919	45,823.86			
Less: 14/90 (period 6-17 to 6-30, inclusive)	7,128.17	38,695.69		
Total 25% Oil revenue			$208,610.29	
25% Gas Revenue				
2nd quarter, 1918	$ 4,021.41			
2nd quarter, 1918	2,874.72	$ 6,896.13		
3rd quarter, 1918		9,545.69		
4th quarter, 1918		11,201.11		
1st quarter, 1919		8,843.44		
2nd quarter, 1919	$ 5,204.39			
Less: 14/90 (period 6-17 to 6-30, inclusive)	809.57	4,394.82		
Total 25% Gas Revenue			$ 40,881.19	
Total 25% Oil & Gas Revenue			$249,491.48	
Martha Jackson entitled to 25% of 1/8, *viz.*, 25% of 1/2 of above 25% fund—or 1/4th of 1/2 equals 1/8 of above sum				$31,186.43
Total due Martha Jackson per decree (see (*) Note)				$142,857.17
Less: Receivership expense (per final report of J. F. Darby, Receiver, July 31, 1920)				
Receiver's salary		$ 20,250.00		
Inside expense		33,320.02		
Outside expense		2,706.64		
Office furniture		1,113.97		
Attorneys' fees		2,350.00		
Gross production tax		66,935.60		
Total, J. F. Darby, Receiver, expense			$126,676.23	

Brought Forward—(Total due Martha Jackson per decree)				$142,857.17
Brought Forward—(Total Darby expense)			$126,673.23	
Receivership expense (per final report of S. L. Morley and George B. Noble, Receivers, dated June 29, 1923)				
Receivers' salaries		$22,177.32		
Inside expense		44,441.42		
Outside expense		1,212.84		
Office furniture		150.00		
Attorneys' fees		21,000.00		
Clerk of the court, to pay ad valorem taxes	$100,000.00			
Plus: Expense paying taxes	1,037.00			
Expense paying taxes	1,446.72			
Total taxes paid and expense		102,483.72		
Total, Morley-Noble Receivership expense			$191,465.30	
Total receivership expense (one-eighth of which was charged to Martha Jackson by contract and final decree)			$318,141.53	
Martha Jackson's 1/8th part				$ 39,767.69
Net amount due Martha Jackson per contracts and decree				$103,089.48
Amount actually paid and relinquished to Martha Jackson per Receiver's report dated June 29, 1923				$308,000.00
Amount relinquished to Martha Jackson				$204,910.52
O. O. Owens' 3/8ths part of amount relinquished in 1920 to Martha Jackson and lost in effort to remove obstacle to use and enjoyment of income				$ 76,841.44

*Note: Computation for purpose of showing Owens' portion of impounded funds at time of relinquishment:

Amount of money in Receiver's hands belonging to O. O. Owens, December 31, 1919:	
25% royalty oil revenue	$1,035,556.18
25% Royalty Gas Revenue	93,031.18
Total 25% oil and gas revenue per Receiver's report	$1,128,587.36
12-1/2 % or 1/8 royalty revenue (1/2)	564,293.68
Amount due Martha Jackson per decree (without deducting 1/8th Receivership administration expense) per above	142,857.17
Balance 1/8th oil and gas royalty revenue in Receiver's hands	$ 421,436.51
O. O. Owens' 3/8ths part after deducting amount due Martha Jackson	$ 158,038.68